CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 525

THE UNITED STATES OF AMERICA, PETITIONER

vs.

FRANKFORT DISTILLERIES, INC.

No. 526

THE UNITED STATES OF AMERICA, PETITIONER

vs.

NATIONAL DISTILLERS PRODUCTS CORPORATION

No. 527

THE UNITED STATES OF AMERICA, PETITIONER

vs.

BROWN-FORMAN DISTILLERS CORPORATION

No. 528

THE UNITED STATES OF AMERICA, PETITIONER

vs.

HIRAM WALKER, INCORPORATED

No. 537

THE UNITED STATES OF AMERICA, PETITIONER

vs.

SCHENLEY DISTILLERS CORPORATION

No. 538

THE UNITED STATES OF AMERICA, PETITIONER

vs.

SEAGRAM-DISTILLERS CORPORATION

No. 539

THE UNITED STATES OF AMERICA, PETITIONER

vs.

HERMAN & ROBBINS, INCORPORATED

No. 550

THE UNITED STATES OF AMERICA, PETITIONER

vs.

J. E. SWEIGLE

PETITION FOR CERTIORARI FILED SEPTEMBER 20, 1944
CERTIORARI GRANTED NOVEMBER 13, 1944

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 523

THE UNITED STATES OF AMERICA, PETITIONER

vs.

FRANKFORT DISTILLERIES, INC.

No. 524

THE UNITED STATES OF AMERICA, PETITIONER

vs.

NATIONAL DISTILLERS PRODUCTS CORPORATION

No. 525

THE UNITED STATES OF AMERICA, PETITIONER

vs.

BROWN FORMAN DISTILLERS CORPORATION

No. 526

THE UNITED STATES OF AMERICA, PETITIONER

vs.

HIRAM WALKER, INCORPORATED

No. 527

THE UNITED STATES OF AMERICA, PETITIONER

vs.

SCHENLEY DISTILLERS CORPORATION

No. 528

THE UNITED STATES OF AMERICA, PETITIONER

vs.

SEAGRAM-DISTILLERS CORPORATION

No. 529

THE UNITED STATES OF AMERICA, PETITIONER

vs.

McKESSON & ROBBINS, INCORPORATED

No. 530

THE UNITED STATES OF AMERICA, PETITIONER

vs.

J. E. SPEEGLE

INDEX

A [Caption omitted.]

1 In the United States District Court for the District of Colorado Sitting at Denver

Criminal No. 9514

UNITED STATES OF AMERICA, PLAINTIFF

v.

HIRAM WALKER, INCORPORATED; SEAGRAM-DISTILLERS CORPORATION; SCHENLEY DISTILLERS CORPORATION; FRANKFORT DISTILLERS, INCORPORATED; MCKESSON & ROBBINS, INCORPORATED; NATIONAL DISTILLERS PRODUCTS CORPORATION; BROWN FORMAN DISTILLERS CORPORATION, J. E. SPEEGLE; ET AL., DEFENDANTS

Order on indictment

March 12, 1942

In the Matter of The Grand Jury. Indictments Returned.

At this day comes Walter Kley, Foreman, together with the members of the Grand Jury, heretofore duly empanelled and sworn as grand jurors and file with the clerk of the court the record of the grand jurors concurring in the finding of each and every indictment, and return into court now here the following endorsed true bills of indictment and not true bills of indictment, to wit:

* * * * *

Thereupon, it is ordered by the court that summons issue herein directed to the defendants * * * Hiram Walker, Inc.; Seagram-Distillers Corporation; Schenley Distillers Corpo-

2 ration; Brown-Forman Distillers Corporation; Frankfort Distillers, Inc.; National Distillers Products Corporation; McKesson & Robbins, Inc.; * * * commanding that they appear before this court to answer to said indictment within twenty (20) days after the service of such summons.

And thereupon, it is ordered by the court that bench warrants issue without delay against all individual defendants and returnable forthwith, and that the defendants be let to bail before an United States Commissioner, for their appearance in this court from day to day and from term to term to answer unto the indictment herein, in the amounts set opposite their names.

In United States District Court

Indictment

Filed March 12, 1942

The Grand Jurors of the United States of America, duly impaneled, sworn, and charged in the District Court of the United

States for the District of Colorado at the November, 1941, term of said Court, inquiring within and for the said District at said term of said Court, do upon their oaths find and present as follows, to wit:

Count One

I. Period of Time Covered by This Count

1. Each of the allegations hereinafter contained in this count shall be deemed to refer to the period of time beginning in or about the month of June, 1935, the exact date being to the Grand Jurors unknown, and continuing thereafter up to and including the date of the presentation of this indictment, unless otherwise expressly stated.

II. Definitions

2. Whenever the term "spirituous liquor" shall be used in this indictment it shall be deemed to mean alcoholic beverages, of whatever description, containing 24% or more of alcohol, by volume.

3. Whenever the term "alcoholic beverages" is used in this indictment it shall be deemed to mean spirituous liquor, wine, and beer.

3 4. Whenever the term "producers" is used in this indictment it shall be deemed to mean persons, partnerships, and corporations engaged in manufacturing, distilling, fermenting, brewing, rectifying, processing, or importing any alcoholic beverage, or any parent, subsidiary, or affiliated corporation thereof engaged in the sale of the products of such person, partnership, or corporation.

5. Whenever the term "wholesalers" is used in this indictment it shall be deemed to mean persons, partnerships, and corporations doing business in the State of Colorado engaged, in whole or in part, in the purchase of alcoholic beverages for resale to retailers.

6. Whenever the term "retailers" is used in this indictment it shall be deemed to mean persons, partnerships, and corporations doing business in the State of Colorado engaged, in whole or in part, in the sale and distribution of alcoholic beverages in bottles and by the case to the consuming public.

7. Whenever the term "wholesale prices" is used in this indictment it shall be deemed to mean prices charged for alcoholic beverages sold by wholesalers to retailers.

8. Whenever the term "retail prices" is used in this indictment it shall be deemed to mean prices charged for alcoholic beverages sold by retailers to the consuming public.

9. Whenever the term "wholesale discount" is used in this indictment it shall be deemed to mean a discount for quantity purchases and the like allowed from or upon the wholesale price.

III. The Defendants

10. The Colorado Wholesale Wine and Liquor Dealers Association, Inc. (hereinafter sometimes designated as the Wholesale Association), is hereby indicted and made a defendant herein. Said Association is a corporation organized and existing under the laws of the State of Colorado, with its principal place of business in Denver, Colorado. The membership of said Association is composed of wholesalers doing business as such within the State of Colorado.

11. The Colorado Package Liquor Association, Inc.
4 (hereinafter sometimes referred to as the Package Association), is hereby indicted and made a defendant herein. Said Association is a corporation organized and existing under the laws of the State of Colorado, with its principal place of business in Denver, Colorado. The membership of said Association is composed of retailers doing business as such within the State of Colorado. Said defendant Package Association and defendant Wholesale Association are sometimes referred to as "defendant associations."

12. The following named corporations are hereby indicted and made defendants herein. Each is a corporation doing business as a producer, organized and existing under the laws of the State, and having its principal offices at the city indicated below. These defendants will sometimes hereinafter be referred to as "defendant producers."

Name of producer	State of incorporation	Principle offices
Hiram Walker Incorporated	Delaware	Detroit, Michigan.
Seagram-Distillers Corporation	Delaware	New York, New York.
Waterfill & Frazier Distillery Company	Missouri	Kansas City, Missouri.
Schenley Distillers Corporation	Delaware	New York, New York.
Gooderham & Worts, Limited	Delaware	Detroit, Michigan.
Jas. Barclay & Co., Limited	Delaware	Detroit, Michigan.
Ben-Burk, Inc	Massachusetts	Boston, Massachusetts.
Brown Foreman Distillers Corporation	Delaware	Louisville, Kentucky.
Calvert-Distillers Corporation	Maryland	New York, New York.
Frankfort Distilleries, Incorporated	West Virginia	Louisville, Kentucky.
Glenmore Distilleries Company	Kentucky	Louisville, Kentucky.
National Distillers Products Corporation	Virginia	New York, New York.
The Fleischmann Distilling Corporation	New York	New York, New York.
William Jameson & Co., Inc	Delaware	New York, New York.
D. J. Bielzoff Products Company	Illinois	Chicago, Illinois.
Garrett & Company, Incorporated	New York	Brooklyn, New York.
The American Distilling Company	Maryland	New York, New York.
Somerset Importers, Ltd	Delaware	New York, New York.
East-Side Winery	California	Lodi, California.

The following named corporations are hereby indicted and made defendants herein. Each is a corporation doing business as a wholesaler, organized and existing under the laws of the State, and having its principal offices at the city, indicated below. Certain of these corporations, as indicated below, are members of defendant Wholesale Association:

Name of corporation	State of incorporation and principal offices	
Reuler-Lewin, Inc	Colorado—Denver, Colorado	Member, Wholesale Association.
Davis Bros., Inc	Colorado—Denver, Colorado	Member, Wholesale Association.
Liquors, Inc	Colorado—Denver, Colorado	Member, Wholesale Association.
A. Carbone and Company, Inc	Colorado—Denver, Colorado	Member, Wholesale Association.
McKesson & Robbins, Incorporated.	Maryland—New York, New York.	Member, Wholesale Association.
Colorado Beverage Company	Colorado—Denver, Colorado	Member, Wholesale Association.
The C. D. Smith Drug Co	Colorado—Grand Junction, Colorado.	Member, Wholesale Association.
Colorado Alcohol Company	Colorado—Denver, Colorado	

6 14. The following named individuals are hereby indicted and made defendants herein. Each of the said individuals is or has been associated, in the capacity indicated below, with one of the defendant associations or with one of the defendant corporations other than the defendant associations, or both, as indicated below. Said individual defendants, during the period covered by this indictment and within three years next preceding the date of its presentation, have been actively engaged in the management, direction, or operation of the affairs, policies, and activities of the respective defendant organizations with which they are or have been associated, as indicated below, particularly those affairs, policies, and activities of the said defendant organizations described in this indictment:

	Name of individual	Residence	Business affiliation	Organization affiliation
	Burg, Morris L	Denver, Colo	President, Liquors, Inc	Director, Wholesale Association.
	Carbone, John A	Denver, Colo	President, A. Carbone and Company, Inc	Director and Ex President, Wholesale Association.
	Carroll, Edward J	Denver, Colo	Employee, Davis Bros., Inc	Ex-Director, Wholesale Association.
	Davis, John C	Denver, Colo	President and General Manager, Davis Bros., Inc	Ex-Director and Ex-President, Wholesale Association.
	Reuler, George C	Denver, Colo	President, Reuler-Lewin, Inc	Director and Treasurer, Wholesale Association.
	Rothberg, Abraham	Denver, Colo	Employee, Sarah Zerobnick, doing business as Midwest Liquor Company.	Director, Wholesale Association.
	Stenzel, Raymond O	Denver, Colo	Manager Liquor Sales, McKesson & Robbins, Incorporated.	
	Wheat, George M	Denver, Colo		Director and Ex-Secretary, Wholesale Association.
	Zerobnick, Joseph	Denver, Colo	Employee, Sarah Zerobnick, doing business as Midwest Liquor Company.	Ex-Executive Secretary, Package Association.
8	Campbell, E. J	Denver, Colo	District Sales Manager, Waterfill & Frazier Distillery Company.	Representative to Wholesale Association.
	Distasi, Angelo	Denver, Colo	District Sales Manager, Calvert-Distillers Corporation	
	Franzen, Arthur L	Denver, Colo	District Sales Manager, Seagram-Distillers Corporation	
	Harlow, Cecil B	Denver, Colo	Division Sales Manager, Schenley Distillers Corporation	
	Langran, Loyce M	Dallas, Texas	District Sales Manager, Glenmore Distilleries Company	
	Lowenstein, David H	Denver, Colo	Division Sales Manager, Garrett & Company, Incorporated.	
	Nier, Harry K	Denver, Colo	District Sales Manager, Hiram Walker, Incorporated	
	Sullivan, Leo	Denver, Colo	District Sales Manager, Brown Forman Distillers Corporation.	
	Webster, Herbert D	Denver, Colo	District Sales Manager, National Distillers Products Corporation.	
	Whitacre, Earl N	Denver, Colo	District Sales Manager, Frankfort Distilleries, Incorporated.	
9	Cursey, Julian W	San Francisco, Calif	Regional Sales Manager, National Distillers Products Corporation.	
	Deateale, R. L	Louisville, Ky	Sales Manager, Glenmore Distilleries Company	
	Fischel, Victor A	New York, New. Y	General Sales Manager, Seagram-Distillers Corporation	
	McLaughlin, D. F	San Francisco, Calif	Western Regional Sales Manager, Schenley Distillers Corporation.	
	Modlish, R. F	San Francisco, Calif	Regional Coordinator, Schenley Distillers Corporation	
	Nauheim, Milton J	New York, New. Y	Executive Vice-President, Schenley Distillers Corporation	
	Sabin, Joseph W	Chicago, Ill	Regional Sales Manager, The Fleischmann Distilling Corporation.	
	Sobel, Max	San Francisco, Calif	Western Division Sales Manager, Seagram-Distillers Corporation.	

Name of individual	Residence	Business affiliation	Organization affiliation
Bert, Philip R	Denver, Colo	District Sales Manager, The American Distilling Company.	
Bakke, Gerald E	Denver, Colo		Director, Package Association.
Boxer, Samuel O	Denver, Colo		Director, Package Association.
Buchan, William K	Lakewood, Colo		Manager and Ex-Executive Vice-President, Wholesale Association.
Cohn, Harry O	Denver, Colo		Ex-Secretary, Package Association.
Corgan, Bert C	Denver, Colo		Vice-President, Package Association.
Eber, Isadore E	Denver, Colo		President, Package Association.
Lewkowitz, Earl B	Denver, Colo		Treasurer, Package Association.
Lutz, John	Pueblo, Colo		Ex-Director, Package Association.
Pringle, Abraham J	Denver, Colo		Director, Package Association.
Rudolph, Jack J	Denver, Colo		Director, Package Association.
Sackowitz, Jacob	Denver, Colo		Ex-Director, Package Association.
Singer, Harry A	Denver, Colo		Ex-Director, Package Association.
Singer, Samuel D	Denver, Colo		Director, Package Association.
Speegle, J. E	Denver, Colo		Ex-Director, Package Association.
Stein, William E	Denver, Colo		Ex-Treasurer, Package Association.
Weinstock, Isadore J	Denver, Colo		Director, Package Association.
Wernet, Edmund	Denver, Colo		Ex-Vice-President, Package Association.
Wolfson, Benjamin H	Denver, Colo		Secretary, Package Association.
Lewin, Morton J	Denver, Colo	Secretary, Reuler-Lewin, Inc	
Kendrick, R. G	Santa Barbara, California	Former Regional Sales Manager, Hiram Walker, Incorporated, San Francisco.	
Works, Lyle A	Denver, Colo	Vice-President, McKesson & Robbins, Incorporated	Ex-Secretary and Director, Wholesale Association.
Tarble, N. E	Detroit, Michigan	General Sales Manager and President, Jas. Barclay & Co., Limited.	
Sturman, E. N	Grosse Pte. Park, Michigan	General Sales Manager and President, Hiram Walker, Incorporated.	
Gross, Boone	Grosse Pte. Park, Michigan	General Sales Manager and President, Gooderham & Worts, Limited.	
Hirsch, Otto E	Kansas City, Missouri	President, Waterfill & Frazier Distillery Company	
Kirk, Charles E	Denver, Colo		Director, Package Association.

13 15. The defendant corporations named in paragraph 13 together with defendants Abraham Rothberg and Joseph Zerobnick are sometimes hereinafter referred to as "defendant wholesalers." The defendants designated in paragraph 14 as being, or as having been, officers and directors of defendant Package Association are sometimes hereinafter referred to as "defendant retailers."

16. During all times hereinafter mentioned some of the corporate defendants named herein have wholly owned or controlled subsidiaries through which a portion of their business is transacted, and wherever in this indictment reference is made to any act or transaction on the part of any one of the said corporate defendants, it shall be deemed to include such act or transaction when performed by any of said subsidiaries.

17. Whenever it is hereinafter alleged in this indictment that any defendant association did any act or thing, such allegation shall be deemed to mean that each of the individuals and corporations named herein as defendants and described as officers, members, agents, or employees of the said defendant association authorized, ordered, or did such act or thing; and whenever it is hereinafter alleged that any defendant corporation (other than defendant associations) did any act or thing, such allegation shall be deemed to mean that each of the said individuals named herein as defendants and described as officers, agents, or employees of the said defendant corporation authorized, ordered, or did such act or thing.

IV. Nature of Trade and Commerce Involved

18. Alcoholic beverages are marketed in the State of Colorado by means of a continuous flow of shipments from producers located outside the State of Colorado, through wholesalers and retailers, to the consuming public. Under the laws of the state of Colorado, alcoholic beverages shipped and sold in bottles by producers therof may be sold to retailers in the State of Colorado only by wholesalers licensed as such under the laws of Colorado. Thus, wholesalers and retailers are the conduit through which alcoholic beverages shipped from states of the United States other than the State of Colorado are sold and distributed to the consuming public within the State of Colorado.

14 19. Until in or about 1940 small quantities of spirituous liquor produced in states of the United States other than the State of Colorado were shipped into the State of Colorado in bulk, bottled in said State, and sold to the consuming public through the medium of wholesalers and retailers. At all times substantial quantities of wines produced in states of the United

States other than the State of Colorado are shipped into the State of Colorado in bulk, bottled in said State, and sold and distributed to the consuming public through the medium of wholesalers and retailers.

20. More than 98% of all spirituous liquor consumed within the State of Colorado is produced outside the State of Colorado and shipped therefrom into the State of Colorado for sale and distribution to the consuming public through the medium of wholesalers and retailers. The total quantity of the spirituous liquors thus shipped into and sold and distributed within the State of Colorado approximates 1,150,000 gallons annually. More than 80% of all wines consumed within the State of Colorado is produced outside the State of Colorado and shipped therefrom into the State of Colorado for sale and distribution to the *State of Colorado for sale and distribution to the* consuming public through the medium of wholesalers and retailers. The total quantity of the wines thus shipped into and sold and distributed within the State of Colorado approximates 800,000 gallons annually. Substantial amounts of the beer consumed within the State of Colorado are produced in states other than the State of Colorado and shipped therefrom into the State of Colorado for sale and distribution to the consuming public through the medium of wholesalers and retailers.

21. Alcoholic beverages are distributed to the more than 700 retailers doing business in the State of Colorado by approximately 28 wholesalers. More than 75% of the spirituous liquors and wines, and substantial quantities of the beer, sold and distributed at wholesale in the State of Colorado are sold and distributed by the defendant wholesalers. All of the spirituous liquor and wines, and substantial quantities of the beer, sold and distributed by the bottle or case to the consuming public in the State of Colorado are sold and distributed by retailers, including defendant retailers and other members of defendant Package Association.

V. The Conspiracy

15 22. The Grand Jurors aforesaid, upon their oaths aforesaid, inquiring as aforesaid, do further find, present, and charge that all of the defendants herein, and other persons to the Grand Jurors unknown, well knowing all the facts alleged in this indictment, beginning in or about the month of June 1935, the exact date being to the Grand Jurors unknown, and continuously thereafter up to and including the date of the presentation of this indictment, knowingly have entered into and engaged in a combination and conspiracy to raise, fix, and maintain the whole prices of spirituous liquor and wines shipped into the State of Colorado from producers located outside the State of Colorado by raising,

fixing, and stabilizing wholesale mark-ups and margins of profit on such liquor and wines, which combination and conspiracy has been and is now in restraint of the hereinbefore described trade and commerce in spirituous liquor and wines among the several states and in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" (U. S. C. A. Title 15, Section 1), commonly known as the Sherman Act, and which combination and conspiracy is now described in further detail, that is to say:

23. It is and has been a part of said combination and conspiracy:

(a) That the defendants from time to time discuss, agree upon, and adopt high, arbitrary, and noncompetitive wholesale prices, mark-ups, and margins of profit and arbitrary and noncompetitive discounts.

(b) That beginning in 1937 and continuing thereafter up to and including the date of this indictment the defendant wholesalers and other members of the defendant Wholesale Association and defendant retailers agree upon and undertake a program, in part through the defendant associations, to persuade, induce, and compel producers, including defendant producers, to enter into producer-wholesaler fair trade contracts affecting the various brands of spirituous liquor and wines shipped by said producers into the State of Colorado, and to establish in and by said contracts high, arbitrary, and artifical wholesale prices
16 embodying the arbitrary and noncompetitive mark-ups, margins of profit, and discounts agreed upon as aforesaid.

(c) That as a part of the program agreed upon and undertaken as aforesaid to persuade, induce, and compel producers to enter into such producer-wholesaler fair trade contracts, the defendant Wholesale Association prepare and adopt forms of such fair trade contracts acceptable to the defendant wholesalers and to the other members of the defendant Wholesale Association; that defendant Wholesale Association agree with producers, including some of the defendant producers, upon the forms of fair trade contracts to be issued by said producers; that the defendant Wholesale Association prepare and circulate among its members bulletins and notices announcing the adoption of producer-wholesaler fair trade contracts, and listing the names of all producers entering into producer-wholesaler fair trade contracts and of all producers not entering into such contracts.

(d) That, in connection with revisions in the wholesale prices established in and by the said fair trade contracts, the defendant wholesalers, acting through defendant Wholesale Association, from time to time advise and agree with producers, including defendant producers, as to such revisions so as to preserve and main-

tain the arbitrary and noncompetitive wholesale mark-ups, margins and profit, and discounts agreed upon as aforesaid.

(e) That the defendant wholesalers and the other members of the defendant Wholesale Association agree among themselves and with defendant producers and defendant retailers to sell, and sell, spirituous liquor and wines covered by the said producer-wholesaler fair trade contracts at wholesale prices, mark-ups, and margins of profit not lower, and at wholesale discounts no higher, than those established in said contracts; that the defendant wholesalers agree among themselves and with the defendant producers that wholesalers selling spirituous liquor and wines at prices, mark-ups, and margins of profit lower, and at wholesale discounts higher, than those established in said fair trade contracts be deprived of the opportunity to purchase such spirituous liquor and wines from defendant producers.

17 (f) That in order further to discourage and prevent sales by wholesalers at prices, mark-ups, and margins of profit lower, and discounts higher, than the prices, mark-ups, and margins of profit agreed upon as aforesaid, defendant wholesalers, acting through defendant Wholesale Association, discuss and agree upon so-called "costs of doing business" as a wholesaler reflecting said agreed-upon prices, mark-ups, and margins of profit; and that defendant wholesalers, acting through defendant Wholesale Association, thereafter institute and prosecute legal proceedings ostensibly to obtain judicial determination of the costs of doing business as a wholesaler, but actually for the purpose of securing legal sanction for said agreed-upon "costs of doing business," as aforesaid, by presenting to the Court only facts tending to support said agreed-up "costs of doing business" and withholding from the Court, and suppressing, facts tending to establish costs of doing business lower than said agreed-upon "costs of doing business" as aforesaid.

(g) That the defendants, acting in part through defendant associations, agree to and do police the high, arbitrary, and noncompetitive wholesale mark-ups and margins of profit, the high, arbitrary, and artificial wholesale prices, and the arbitrary and noncompetitive wholesale discounts agreed upon as aforesaid, and agree to and do require and enforce observance thereof; that defendant Wholesale Association employ paid executives and investigators to spy upon and harass wholesalers who fail or refuse to observe said wholesale prices, mark-ups, margins of profit, and discounts; that defendant Wholesale Association threaten to institute, and in fact institute or cause to be instituted, legal proceedings against wholesalers who fail or refuse to observe said wholesale prices, mark-ups, margins of profit, and discounts; that to finance the aforesaid activities the defendants, beginning in or

about July 1936 and continuing up until the date of this indictment, agree upon and provide for the collection of an extra charge added to the wholesale price, the proceeds thereof to be paid to defendant Wholesale Association, and that defendant Wholesale Association in turn from time to time pay to defendant Package Association a portion of said proceeds.

18 (h) That such fair trade agreements as aforesaid be made, agreed upon, and carried out in a manner and for purposes not contemplated by the Miller-Tydings Amendment to the Sherman Act (Act of Congress, August 17, 1937; 50 Stat. 693) or the Colorado Fair Trade Act (Vol. 4, Sec. 20 (1)–20 (5, C. 165, 1937 Colorado Statutes Annotated).

24. For the purpose of effectuating the aforesaid combination and conspiracy the defendants have regularly and continuously entered into those agreements and done those things which they combined and conspired to do as hereinbefore alleged.

VI. Effect of the Conspiracy

25. The effect of the combination and conspiracy hereinbefore alleged is and has been (a) to raise, fix, stabilize, and maintain the wholesale prices of spirituous liquor and wines shipped in interstate commerce into the State of Colorado and sold and distributed therein, at levels acceptable to and approved by the defendants; (b) to eliminate price competition among the defendant wholesalers in the sale and distribution of spirituous liquor and wines shipped in interstate commerce into the State of Colorado; (c) to eliminate price competition between defendant wholesalers and the other members of defendant Wholesale Association in the sale and distribution of spirituous liquor and wines shipped in interstate commerce into the State of Colorado; (d) to restrain and suppress interstate trade and commerce in spirituous liquor and wines not covered by producer-wholesaler fair trade contracts.

26. It has never been and is not now the purpose, intent, or effect of said combination and conspiracy to promote the purpose of the Miller-Tydings Act (Act of Congress, August 17, 1937; 50 Stat. 693) and the Colorado Fair Trade Act (Vol. 4, Sec. 20 (1)-20 (5), C. 165, 1937 Colorado Statutes Annotated), or to establish wholesale prices on spirituous liquor and wines for the protection of the goodwill in the trade-marks, brands, or names of the producers or wholesalers producing or distributing such spirituous liquor and wine.

VII. Jurisdiction and Venue

19 27. The combination and conspiracy herein alleged has been entered into and carried out in part within the District

of Colorado. During the period of said conspiracy and within three years next preceding the presentation of this indictment, the defendants have performed within the District of Colorado many of the acts and things set forth in paragraph 23 hereof.

28. And so the Grand Jurors aforesaid, upon their oaths aforesaid, do find and present that the defendants throughout the period aforesaid at the places and in the manner aforesaid, unlawfully have engaged in a continuing combination and conspiracy in restraint of the aforesaid trade and commerce in spirituous liquor and wines among the several states of the United States, contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the United States.

COUNT TWO

And the Grand Jurors aforesaid, upon their oaths aforesaid, inquiring as aforesaid, do hereby reaffirm, reallege, and incorporate as if herein set forth in full, each of the allegations set forth in paragraphs 2 to 21, inclusive, contained in Count One of this indictment.

I. Period of Time Covered by This Count

29. Each of the allegations hereinafter contained in this count shall be deemed to refer to the period of time beginning in or about January 1936, the exact date being to the Grand Jurors unknown, and continuing thereafter up to and including the date of the presentation of this indictment, unless otherwise expressly stated.

II. The Conspiracy

30. The Grand Jurors aforesaid, upon their oaths aforesaid, inquiring as aforesaid, do further find, present, and charge that all of the defendants herein and other persons to the Grand Jurors unknown, well knowing all the facts alleged in this indictment, beginning in or about January 1936, the exact date being to the Grand Jurors unknown, and continuously thereafter up to
20 and including the date of the presentation of this indictment, knowingly have entered into and engaged in a combination and conspiracy to raise, fix, and maintain the retail prices of alcoholic beverages shipped into the State of Colorado from producers located outside the State of Colorado by raising, fixing, and stabilizing retail mark-ups and margins of profit on such alcoholic beverages, which combination and conspiracy has been and is now in restraint of the hereinbefore described trade and commerce in alcoholic beverages among the several states and in violation of

Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" (U. S. C. A. Title 15, Section 1), commonly known as the Sherman Act, and which combination and conspiracy is now described in further detail, that is to say:

31. It is and has been a part of said combination and conspiracy:

(a) That the defendants from time to time discuss, agree upon, and adopt high, arbitrary, and noncompetitive retail prices, mark-ups, and margins of profit.

(b) That beginning in 1937 and continuing thereafter up to and including date of this indictment defendant retailers and defendant wholesalers and other members of defendant associations agree upon and undertake a program, in part through defendant associations, to persuade, induce, and compel producers, including defendant producers, and wholesalers, to enter into fair trade contracts affecting every type and brand of alcoholic beverages shipped into the State of Colorado and to establish in and by said contracts high, arbitrary, and artificial retail prices embodying the high, arbitrary, and noncompetitive retail mark-ups and margins of profit agreed upon as aforesaid.

(c) That as a part of the program agreed upon and undertaken as aforesaid to persuade, induce, and compel producers and wholesalers to enter into such fair trade contracts, the defendant Package Association prepare and adopt forms of fair trade contracts acceptable to the defendant retailers and to the other members of the defendant Package Association; that defendant
21 Package Association agree with producers and wholesalers, including some of the defendant producers and defendant wholesalers, upon the forms of fair trade contracts to be used by said producers and wholesalers.

(d) That the defendant Package Association prepare and circulate among its members bulletins and notices announcing the adoption of fair trade contracts and listing the names of producers and wholesalers entering into fair trade contracts and of all producers and wholesalers not entering into such contracts; that defendant retailers, through defendant Package Association, agree to and do patronize only those producers and wholesalers, including defendant producers and defendant wholesalers, who enter into fair trade contracts embodying said retail prices, mark-ups, and margins of profit, and who require and compel observance of the minimum retail prices established in and by said fair trade contracts; that defendant retailers, through defendant Package Association, agree to and do withhold their patronage from producers and wholesalers who fail or refuse to enter into

such fair trade contracts embodying such retail prices, mark-ups, and margins of profit.

(e) That, in connection with revisions in the retail prices established in and by the said fair trade contracts, the defendant retailers, acting through defendant Package Association, from time to time advise and agree with producers and wholesalers, including defendant producers and defendant wholesalers, as to such revisions so as to preserve and maintain the retail mark-ups and margins of profit agreed upon as aforesaid.

(f) That the defendants, acting in part through defendant associations, agree to and do police the high, arbitrary, and non-competitive retail prices, marks-ups, and margins of profit agreed upon as aforesaid, and require and secure observance thereof; that defendant associations employ paid executives and investigators to spy upon and harass retailers who fail or refuse to observe said retail prices, mark-ups, and margins of profit; that defendant associations threaten to institute and in fact institute or cause to be instituted legal proceedings against retailers
22 who fail or refuse to observe said retail prices, mark-ups, and margins of profit; that the defendant retailers agree among themselves and with the defendant producers and the defendant wholesalers that retailers selling alcoholic beverages at prices, mark-ups, and margins of profit lower than those established in said fair trade contracts be deprived of the opportunity to purchase such alcoholic beverages from defendant producers and defendant wholesalers; that defendant retailers threaten to boycott and in fact boycott wholesalers and producers who supply their products to retailers failing or refusing to observe said retail prices, mark-ups, and margins of profit; that to finance the aforesaid activities the defendants, beginning in or about July 1936 and continuing up until the date of this indictment, agree upon and provide for the collection of an extra charge added to the wholesale price, the proceeds thereof to be paid to defendant Wholesale Association, and that defendant Wholesale Association in turn from time to time pay to defendant Package Association a portion of said proceeds.

(g) That, in disregard of the Colorado Fair Trade Act (Vol. 4, Sec. 20 (1)–20 (5), C. 165, 1937 Colorado Statutes Annotated) and in order to maintain the retail prices, mark-ups, and margins of profit agreed upon and policed as aforesaid, the defendants agree to and do discourage and prevent sales of merchandise being or to be closed out by the owner thereof at retail prices lower than those established in and by said fair trade contracts.

(h) That in order to reduce price competition among retailers, defendant retailers, acting in part through defendant Package Association agree and attempt to persuade and induce the author-

ized officials of the State of Colorado and the City and County of Denver, Colorado, to reject applications for retail liquor licenses.

(i) That such fair trade agreements as aforesaid be made, agreed upon, and carried out in a manner and for purposes not contemplated by the Miller-Tydings Amendment to the Sherman Act (Act of Congress, August 17, 1937; 50 Stat. 693) or the Colorado Fair Trade Act (Vol. 4, Sec. 20 (1)–20 (5), C. 165, 1937 Colorado Statutes Annotated).

32. For the purpose of effectuating the aforesaid combination and conspiracy the defendants have regularly and continuously entered into those agreements and done those things which they combined and conspired to do as hereinbefore alleged.

III. Effect of the Conspiracy

33. The effect of the combination and conspiracy hereinbefore alleged is and has been (a) to raise, fix, stabilize, and maintain the retail prices of alcoholic beverages shipped in interstate commerce into the State of Colorado and sold and distributed therein, at levels acceptable to and approved by the defendants; (b) to eliminate price competition among the defendant retailers in the sale and distribution of alcoholic beverages shipped in interstate commerce into the State of Colorado; (c) to eliminate price competition among the members of the defendant Package Association in the sale and distribution of alcoholic beverages shipped in interstate commerce into the State of Colorado; (d) to restrain and suppress interstate trade and commerce in alcoholic beverages not covered by fair trade contracts.

34. It has never been and is not now the purpose, intent, or effect of said combination and conspiracy to promote the purposes of the Miller-Tydings Act (Act of Congress, August 17, 1937; 50 Stat. 693) and the Colorado Fair Trade Act (Vol. 4, Sec. 20 (1)–20 (5), C. 165, 1937 Colorado Statutes Annotated), or to establish retail prices on alcoholic beverages for the protection of the goodwill in the trademarks, brands, or names of the producers or wholesalers producing or distributing said alcoholic beverages.

IV. Jurisdiction and Venue

35. The combination and conspiracy herein alleged has been entered into and carried out in part within the District of Colorado. During the period of said conspiracy and within three years next preceeding the presentation of this indictment, the defendants have performed within the District of Colorado many of the acts and things set forth in paragraph 31 hereof.

36. And so the Grand Jurors aforesaid, upon their oaths aforesaid, do find and present that the defendants throughout the period aforesaid, at the places and in the manner aforesaid, unlawfully have engaged in a continuing combination and conspiracy in restraint of the aforesaid trade and commerce in alcoholic beverages among the several states of the United States, contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the United States.

A true bill:

WALTER KLEY, Foreman.

JAMES McI. HENDERSON,
Special Assistant to the Attorney General.
JOHN W. PORTER,
Special Assistant to the Attorney General.
JAMES R. BROWNING,
Special Attorney.
DONALD W. MARSHALL,
Special Attorney.
S. L. R. McNICHOLS,
Special Attorney.

THURMAN ARNOLD,
Assistant Attorney General.
THOMAS J. MORRISSEY,
United States Attorney.
(File endorsement omitted.)

In United States District Court

Motion to Quash of Hiram Walker, Inc.

Come now Hiram Walker, Incorporated, * * * defendants in the above entitled action, by their undersigned attorneys, and separately move the Court to quash:

I. Count one of the indictment herein on the ground
25 that said count does not allege facts which if proven to be true would constitute a criminal offense on the part of these defendants.

II. Count two of said indictment on the ground that said count does not allege facts which if proven to be true would constitute a criminal offense on the part of these defendants.

III. Counts one and two of said indictment on the ground that said counts do not allege facts which if proven to be true, would constitute a criminal offense on the part of these defendants, or any of them, for the following among other reasons:

(1) That spirituous liquor and wines shipped into the State of Colorado from producers located outside the State of Colorado, come under the exclusive control of the State of Colorado after delivery within the state and before sale, and any alleged illegal conduct by these defendants with respect to such liquors is not an offense under the Sherman Act relating to Interstate Commerce but relates solely to Intrastate Commerce and is conduct over which the State of Colorado has exclusive jurisdiction.

(b) That under the Twenty-first Amendment to the Constitution of the United States the individual states are given control over intoxicating liquors within their respective borders, with supreme jurisdiction to prohibit such liquor absolutely, or to permit the sale of intoxicating liquors within the state and exclusively to prescribe all regulations relating to such sale within the state, without violating Article I, Section 8 (3) of the Federal Constitution and without violating any Federal laws, including the Sherman Act, enacted under such Commerce Clause.

IV. Counts one and two of said indictment on the ground that said indictment and each count thereof is so vague, ambiguous, indefinite and uncertain as to fail to apprise these defendants of the nature and character of the accusations made against
26 them and is so ambiguous, indefinite and uncertain as to fail to advise these defendants of the proof which they must expect to meet upon any trial to be had, and so indefinite and uncertain in its allegations that these defendants are unable to prepare their defenses thereto.

V. Counts one and two of said indictment on the ground that the facts therein alleged, if proven to be true, would constitute price fixing, so far as these defendants are concerned, of the type expressly permitted by and under the laws of the United States and the laws of the State of Colorado.

VI. Counts one and two of said indictment on the ground that the facts therein alleged, if proven to be true would, as to these defendants, constitute solely the making and enforcing of contracts which are lawful by the express provisions of the Acts of the Congress of the United States and the statutes of the State of Colorado for the following among other reasons, to wit: as to these defendants, such contracts described in said indictment were solely contracts relating to the sale or resale of commodities which bore the trade-mark, brand or name of the defendant who was the producer of same and which commodities were in free and open competition with commodities of the same general class produced by others; as to these defendants, such contracts described in said indictment were solely contracts which provided that the buyer of such commodities from the producer thereof would not resell such

commodities at less than the respective minimum prices stipulated by the defendant who was the producer thereof; and such contracts described in said indictment were not made between or among producers or between or among distributors or between or among wholesalers or between or among retailers, but each such alleged contract was made between a defendant who produced such commodities, on the one hand, and a distributor, wholesaler or retailer who purchased from such producer the commodities, on the other hand.

VII. Counts one and two of said indictment on the ground that said indictment and each count thereof shows
27 on its face that this court has no jurisdiction of the subject matter of this indictment.

Respectfully submitted.

CHARLES ROSENBAUM,
PERCY S. MORRIS,
*A. H. STUART,
*Attorneys for defendants Hiram Walker Incorporated, 930 University Building, Denver, Colorado. *Penobscot Bldg., Detroit, Mich.*

Filed United States District Court, Denver, Colorado, July 10, 1942—G. Walter Bowman, Clerk.

In United States District Court

Demurrer of Hiram Walker, Incorporated

Come now Hiram Walker, Incorporated, * * * defendants in the above-entitled action, and separately demur to the indictment filed herein and as grounds therefor alleges:

I. That the indictment and each count thereof fails to state facts sufficient to constitute an offense against the laws of the United States by these defendants.

II. That said indictment and each count thereof and the matters therein contained and the manner and form as the same are therein set forth are not sufficient in law.

III. That said indictment and each count thereof fails to state facts which, if proved to be true, would constitute a criminal offense on the part of these defendants or any of them, for the following among other reasons:

(a) That spirituous liquor and wines shipped into the State of Colorado, from producers located outside the State of Colorado, come under the exclusive control of the State of Colorado after delivery within the state and before sale, and any alleged illegal conduct by these defendants with respect to such liquors is

not an offense under the Sherman Act relating to interstate commerce but relates solely to intrastate commerce and is conduct over which the State of Colorado has exclusive jurisdiction.

28 (b) That under the Twenty-first Amendment to the Constitution of the United States the individual states are given control over intoxicating liquors within their respective borders, with supreme jurisdiction to prohibit such liquor absolutely, or to permit the sale of intoxicating liquors within the state and exclusively to prescribe all regulations relating to such sale within the state, without violating Article I, Section 8 (3) of the Federal Constitution and without violating any Federal laws, including the Sherman Act, enacted under such Commerce Clause.

IV. That the facts set forth in said indictment, if proven to be true, would constitute price fixing, so far as these defendants are concerned, of the type expressly permitted by and under the laws of the United States and the laws of the State of Colorado.

V. That said indictment and each count thereof, if proven to be true would, as to these defendants, constitute solely the making and enforcing of contracts which are lawful by the express provisions of the Acts of the Congress of the United States and the statutes of the State of Colorado for the following among other reasons, to wit: as to these defendants, such contracts described in said indictment were solely contracts relating to the sale or resale of commodities which bore the trade-mark, brand or name of the defendant who was the producer of same and which commodities were in free and open competition with commodities of the same general class produced by others; as to these defendants, such contracts described in said indictment were solely contracts which provided that the buyer of such commodities from the producer thereof would not resell such commodities at less than the respective minimum prices stipulated by the defendant who was the producer thereof; and such contracts described in said indictment were not made between or among producers or among distributors or between or among wholesalers or between or among retailers, but each such alleged contract was made between a defendant who produced such commodities, on the one hand, and a distributor, wholesaler or retailer who purchased from such producer the commodities, on the other hand.

VI. That said indictment and each count thereof is so

29 vague and uncertain that it fails to charge any crime or offense whatsoever and fails to inform or apprise these defendants of the alleged offense wherewith they or any of them are charged, or of the nature or cause of the accusation against them.

VII. That said indictment and each count thereof shows on its face that this court has no jurisdiction in the premises or over the subject matter thereof and that the State of Colorado and the courts of said state have sole and exclusive jurisdiction concerning the subject matter of said indictment and the alleged violations of the law pertaining thereto.

CHARLES ROSENBAUM,
PERCY S. MORRIS,
930 University Building, Denver, Colorado.
A. H. STUART,
Penobscot Bldg., Detroit, Michigan,
Attorneys for defendants, Hiram Walker, Incorporated.

Filed United States District Court, Denver, Colorado, July 10, 1942—G. Walter Bowman, Clerk.

In United States District Court

Demurrer and Motion to Quash of Seagram-Distillers Corporation

Come now Seagram-Distillers Corporation, * * * defendants in the above entitled action, and separately demur to the indictment and move that the Court:

1. Quash Count One of the indictment herein; and for grounds for this demurrer and motion these defendants represent that the said count does not allege fact which, if proved to be true, would constitute a criminal offense on the part of these defendants, or any of them, for the following, among other, reasons:

(a) The distilled products as to which it is claimed the wholesale and retail price was fixed by defendants, among others, came to rest in the hands of the wholesalers and all crimes alleged are in connection with intrastate commerce.

(b) Under the Twenty-first Amendment to the Constitution of the United States, liquor is taken out of interstate commerce and jurisdiction is vested exclusively in the states, which may regulate it or prohibit it as they please. Consequently, Count One sets out no crime.

(c) Count one alleges that the distillers, or producers as they are termed in the indictment, including these defendants, were coerced into action by the wholesalers and retailers. Consequently, as to said distillers, Count One sets out no crime.

(d) It is no crime for the distillers, including these defendants, to accept the results of agreements between wholesalers and retailers even though such agreements in themselves may be illegal.

(e) Count One is so vague, indefinite, and uncertain as regards

the distillers, including these defendants, that no offense against them can be spelled out of it, nor does it apprise these defendants of the offense with which they are charged, if any.

2. Quash Count Two of the indictment herein; and for grounds of this demurrer and motion these defendants represent that the said count does not allege facts which, if proved to be true, would constitute a criminal offense on the part of these defendants, or any of them, and for the additional reasons set forth under paragraph 1, sub-paragraphs (a) to (e) inclusive.

Of Counsel:

EZRA CORNELL,
14 Wall Street, New York City,
W. W. GRANT,
MORRISON SHAFROTH,
HENRY W. TOLL,
Attorneys for Defendants above named,
730 Equitable Building, Denver, Colorado.

Filed United States District Court, Denver, Colorado, July 8, 1942—G. Walter Bowman, Clerk.

31 In United States District Court

Demurrer and Motion to Quash of Schenley Distillers Corporation

Comes now Schenley Distillers Corporation, * * * defendants in the above-entitled action, and separately demur to the indictment and move that the Court:

1. Quash Count One of the indictment herein; and for grounds for this demurrer and motion these defendants represent that the said count does not allege facts which, if proved to be true, would constitute a criminal offense on the part of these defendants, or any of them, for the following, among other, reasons:

(a) The distilled products as to which it is claimed the wholesale and retail price was fixed by defendants, among others, came to rest in the hands of the wholesalers and all crimes alleged are in connection with intrastate commerce.

(b) Under the Twenty-first Amendment to the Constitution of the United States, liquor is taken out of interstate commerce and jurisdiction is vested exclusively in the states, which may regulate it or prohibit it as they please. Consequently, Count One sets out no crime.

(c) Count one alleges that the distillers, or producers as they are termed in the indictment, including these defendants, were coerced into action by the wholesalers and retailers. Consequently, as to said distillers, Count One sets out no crime.

(d) It is no crime for the distillers, including these defendants, to accept the results of agreements between wholesalers and retailers even though such agreements in themselves may be illegal.

(e) Count One is so vague, indefinite, and uncertain as regards the distillers, including these defendants, that no offense against them can be spelled out of it, nor does it apprise these defendants of the offence with which they are charged, if any.

(f) The allegations of fact with respect to these defendants show that said defendants acted in conformity with the provisions of the amendment to the Sherman Anti-Trust Act, known as
32 the Miller-Tydings Amendment, being 15 U. S. C. A., 1, and the laws of the State of Colorado, known as the Colorado Fair Trade Act, Session Laws of 1937, Chapter 146.

2. Quash Count Two of the indictment herein; and for grounds of this demurrer and motion these defendants represent that the said count does not allege facts which, if proved to be true, would constitute a criminal offense on the part of these defendants, or any of them, and for the additional reasons set forth under paragraph 1, subparagraphs (a) to (e) inclusive.

Of Counsel:

ROBERT S. MARX,
Cincinnati, Ohio.
GEORGE R. BENEMAN,
Washington, D. C.
RALPH T. HEYMSFELD,
New York City, New York.
IRA C. ROTHGERBER,
WALTER M. APPEL,
Attorneys for above-named defendants,
630 Symes Building, Denver, Colorado.

Filed United States District Court, Denver, Colorado, July 10, 1942—G. Walter Bowman, Clerk.

In United States District Court

Demurrer to the Indictment and Motion to Quash Said Indictment of Frankfort Distillers, Inc.

Come now the defendants, * * *, Frankfort Distilleries, Incorporated, * * *, by their attorneys, and say that said indictment and each count thereof and the matters therein contained, in manner and form as the same are therein alleged and set forth, are insufficient in law to require these defendants, or any of them, to plead to said indictment or any count thereof or to answer the same, and that said indictment and each count thereof are insufficient in law to sustain a judgment against these defend-

ants, or any of them; and, without intending to waive any other substantial causes of demurrer by the enumeration of the following specific causes, demur to said indictment and each count
33 thereof and move to quash the same upon the following grounds:

1. Said indictment and each count thereof are insufficient and wholly fail to set forth any facts or allege or charge the commission of any acts by the defendants, or any of them, constituting an offense against the United States, that is to say:

(a) Three paragraphs of Count One, which undertakes to describe the supposed combination and conspiracy, do not allege or charge a violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," as amended.

(b) The paragraphs of Count Two, which undertakes to describe the supposed combination and conspiracy, do not allege or charge a violation of Section 1 of the Act of Congress of July 2, 1890, as amended.

(c) It does not appear from the allegations of either Count of the indictment that the defendants combined and conspired to do an act or acts which constitute per se a violation of the Act of Congress of July 2, 1890, as amended.

(d) It does not appear from the allegations contained in said Counts, or in either of them, that the objects or purposes of said supposed combination or conspiracy were intended to be accomplished by any means or methods which would constitute a violation of Section 1 of the Act of Congress of July 2, 1890, as amended; that is to say:

(1) The allegations of the indictment fail to state facts showing that the defendants agreed to effectuate the supposed conspiracy by any unlawful means.

(2) The allegations of the indictment from which must be determined whether the purposes and objects of the supposed conspiracy were to be accomplished by illegal means, are too vague, indefinite, and uncertain to apprise the defendants of the nature of the charges made against them.

(3) The allegations of the indictment fail to state facts showing that the means intended to be used by the defendants to ac-
34 complish the suposed conspiracy, constitute a direct, unreasonable or undue restraint of trade or commerce among the several states, or a monopoly thereof.

(4) The allegations of the indictment fail to state facts showing intent or power on the part of the defendants to use means to effectuate the supposed conspiracy which would restrain or monopolize trade or commerce among the several states.

(5) The allegations of the indictment from which must be gathered the means intended to be used to effectuate the supposed conspiracy, constitute mere conclusions of law.

2. Said indictment and each count thereof in purporting to allege an offense against the United States are not sufficiently definite or certain, but on the contrary are vague, indefinite, uncertain and equivocal to such an extent that these defendants and each of them are not advised thereby of the nature and cause of the accusations made against them so that they may properly prepare and submit their separate defenses and avail themselves of a conviction or acquittal for protection against a further prosecution for the same cause.

3. Said indictment and each count thereof are fatally duplicitous, in that each count joins several separate, independent, disconnected and unrelated alleged conspiracies.

4. The conspiracy, alleged in the First Count of the indictment, to raise, fix, and maintain wholesale prices of spirituous liquors and wines was not in restaint of trade or commerce among the several states since it appears on the face of the indictment that such wholesale sales were made by Colorado wholesalers to Colorado retailers in intra-state commerce after said spirituous liquors and wines had come to rest in the hands of said Colorado wholesalers for purposes of sale and had been commingled with Colorado goods.

5. The conspiracy alleged in the Second Count of the indictment, to raise, fix, and maintain retail prices of spirituous liquors and wines was not in restraint of trade or commerce among the several states since it appears on the face of the indictment that such retail sales were made by Colorado retailers to the Colorado consuming public in intrastate commerce after said spirituous liquors and wines had come to rest in the hands of said Colorado retailers for purposes of sale and had been commingled with Colorado goods.

6. The Sherman Act as amended by the Miller-Tydings Amendment Act of August 17, 1937, 15 U. S. C. Sec. 1, in conjunction with the Colorado Fair Trade Act permits a distiller to contract with a wholesaler or retailer as to resale price on any terms whatever regardless of any conspiracies which may be alleged to exist among the wholesalers and retailers as to the prices, mark-ups and margins of profit to which these groups allegedly intend to adhere.

7. Said indictment and each and every count thereof fails to charge an offense against the United States with the certainty required by law so as to fairly inform these particular defendants of the nature of the charges intended thereby to be preferred against them or to inform these defendants as to which of the numerous acts speciously alleged to have been done by all eighty-two defendants, they are charged to have done or ordered, and

thereby these defendants are unable to understand the exact nature of the charge to be met and properly prepare and submit defenses thereto.

8. Because certain defects are specified herein, it is not intended that any defects, omissions, or imperfections are waived and the same are hereby insisted upon with like effect as if the same were herein specifically set forth and enumerated.

Wherefore, the defendants, and each of them, pray judgment that this demurrer be sustained as to them, and each of them; that said indictment, and each count thereof, be quashed, and that they, and each of them, be dismissed and discharged of this indictment by the court.

ROBERT G. BOSWORTH,
CLYDE C. DAWSON,
PERSHING, BOSWORTH, DICK & DAWSON,
Attorneys for Frankfort Distilleries, Incorporated.

Filed United States District Court, Denver, Colorado, July 9, 1942. G. Walter Bowman, Clerk.

36 In United States District Court

Demurrer and Motion to Quash of McKesson & Robbins, Incorporated

Come now McKesson & Robbins, Incorporated, * * *, defendents in th above-entitled action, and separately demur and move that the court quash Counts One and Two of said indictment; and as grounds therefor these defendants state:

(1) That said indictment does not, nor does either count thereof, allege facts which, if proved to be true, would constitute a criminal offense on the part of these defendants or any of them.

(2) That the indictment, and each count thereof, is so vague, indefinite, and uncertain that it fails to appraise these defendants or any of them of the nature of the accusation against them.

W. W. GRANT,
MORRISON SHAFROTH,
HENRY W. TOLL,
730 Equitable Bldg., Denver, Colo.
SILMON SMITH,
Grand Junction, Colorado.

Of counsel:
C. FRANK REAVIS,
20 Pine St., New York City.
Address of defendants: 14th & Lawrence Sts., Denver, Colorado.

Filed United States District Court, Denver, Colorado, July 8, 1942. G. Walter Bowman, Clerk.

In United States District Court

Demurrer and Motion to Quash of National Distillers Products Corporation to the Indictment

Come now National Distillers Products Corporation, * * * defendants in the above-entitled matter, by their attorneys, and jointly and severally demur to the indictment filed herein, and to each count thereof, and move to quash the same, and as grounds therefor allege:

37 1. That the indictment fails and each count thereof fails to state facts constituting a charge against these defendants or either of them sufficient, in fact or law, to constitute an offense against the United States of America by these defendants or either of them.

2. That said indictment is, and each count thereof is vague, indefinite, uncertain, and wholly fails to allege any acts or doings of the defendants or either of them which constitute an offense against the laws of the United States of America.

Wherefore, these defendants and each of them pray judgment that this demurrer be sustained as to them and each of them that said indictment and each count thereof be quashed and that they and each of them be dismissed and discharged of this indictment by the court.

HODGES, VIDAL & GOREE,
WM. V. HODGES,
Attorneys for defendants National Distillers Corporation,
947 Equitable Building, Denver, Colorado.

Filed United States District Court, Denver, Colorado, July 10, 1942. G. Walter Bowman, Clerk.

In United States District Court

Demurrer to the Indictment and Motion to Quash Said Indictment of Brown Forman Distillers Corporation

Come now the defendants, Brown Forman Distillers Corporation, * * *, by their attorneys, and say that said indictment and each count thereof and the matters therein contained, in manner and form as the same are therein alleged and set forth, are insufficient in law to require these defendants or any of them, to plead to said indictment or any count thereof or to answer the same, and that said indictment and each count thereof are insufficient in law to sustain a judgment against these defendants, or any of them; and, without intending to waive any other sub-

stantial causes of demurrer by the enumeration of the following specific causes, demur to said indictment and
38 each count thereof and move to quash the same upon the following grounds:

1. Said indictment and each count thereof are insufficient and wholly fail to set forth any facts or allege or charge the commission of any acts by the defendants, or any of them, constituting an offense against the United States, that is to say:

(a) The paragraph of Count One, which undertakes to describe the supposed combination and conspiracy, do not allege or charge a violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," as amended.

(b) The paragraphs of Count Two, which undertakes to describe the supposed combination and conspiracy, do not allege or charge a violation of Section 1 of the Act of Congress of July 2, 1890, as amended.

(c) It does not appear from the allegations of either Count of the indictment that the defendants combined and conspired to do an act or acts which constitute per se a violation of the Act of Congress of July 2, 1890, as amended.

(d) It does not appear from the allegations contained in said Counts, or in either of them, that the objects or purposes of said supposed combination or conspiracy were intended to be accomplished by any means or methods which would constitute a violation of Section 1 of the Act of Congress of July 2, 1890, as amended; that is to say:

(1) The allegations of the indictment fail to state facts showing that the defendants agreed to effectuate the supposed conspiracy by any unlawful means.

(2) The allegations of the indictment from which must be determined whether the purposes and objects of the supposed conspiracy were to be accomplished by illegal means are too vague, indefinite, and uncertain to apprise the defendants of the nature of the charges made against them.

(3) The allegations of the indictment fail to state facts
39 showing that the means intended to be used by the defendants to accomplish the supposed conspiracy, constitute a direct, unreasonable, or undue restraint of trade or commerce among the several states, or a monopoly thereof.

(4) The allegations of the indictment fail to state facts showing intent or power on the part of the defendants to use means to effectuate the supposed conspiracy which would restrain or monopolize trade or commerce among the several states.

(5) The allegations of the indictment from which must be gathered the means intended to be used to effectuate the supposed conspiracy constitute mere conclusions of law.

2. Said indictment and each count thereof in purporting to allege an offense against the United States are not sufficiently definite or certain but, on the contrary, are vague, indefinite, uncertain, and equivocal to such an extent that these defendants and each of them are not advised thereby of the nature and cause of the accusations made against them so that they may properly prepare and submit their separate defenses and avail themselves of a conviction or acquittal for protection against a further prosecution for the same cause.

3. Said indictment and each count thereof are fatally duplicitous in that each count joins several separate independent, disconnected, and unrelated alleged conspiracies.

4. The conspiracy alleged in the First Count of the indictment, to raise, fix, and maintain wholesale prices of spirituous liquors and wines, was not in restraint of trade or commerce among the several states, since it appears on the face of the indictment that such wholesale sales were made by Colorado wholesalers to Colorado retailers in intrastate commerce after said spirituous liquors and wines had come to rest in the hands of said Colorado wholesalers for purposes of sale and had been commingled with Colorado goods.

5. The conspiracy alleged in the Second Count of the indictment, to raise, fix, and maintain retail prices of spirituous liquors and wines, was not in restraint of trade or commerce among the several states, since it appears on the face of the indictment that such retail sales were made by Colorado retailers to the Colorado consuming public in intrastate commerce after said spirituous liquors and wines had come to rest in the hands of said Colorado retailers for purposes of sale and had been commingled with Colorado goods.

6. The Sherman Act, as amended by the Miller-Tydings Amendment Act of August 17, 1937, 15 U. S. C., Sec. 1, in conjunction with the Colorado Fair Trade Act, permits a distiller to contract with a wholesaler or retailer as to resale price on any terms whatever regardless of any conspiracies which may be alleged to exist among the wholesalers and retailers as to the prices, mark-ups, and margins of profit to which these groups allegedly intend to adhere.

7. Said indictment and each and every count thereof fails to charge an offense against the United States with the certainty required by law so as to fairly inform these particular defendants of the nature of the charges intended thereby to be preferred

against them or to inform these defendants as to which of the numerous acts speciously alleged to have been done by all eighty-two defendants they are charged to have done or ordered, and thereby these defendants are unable to understand the exact nature of the charge to be met and properly prepare and submit defenses thereto.

8. Because certain defects are specified herein, it is not intended that any defects, omissions, or imperfections are waived, and the same are hereby insisted upon with like effect as if the same were herein specifically set forth and enumerated.

Wherefore the defendants, and each of them, pray judgment that this demurrer be sustained as to them, and each of them; that said indictment, and each count thereof, be
41 quashed, and that they, and each of them, be dismissed and discharged of this indictment by the court.

DINES, DINES & HOLME.
ROBERT E. MORE.
MILTON J. KEEGAN.
Attorneys for Brown Forman Distillers Corporation.

7-10-42 Received three copies of the above.

JAMES R. BROWNING,
Special Attorney, Anti-Trust Division.

Filed United States District Court, Denver, Colorado, July 10, 1942. G. Walter Bowman, Clerk.

In United States District Court

Motion to Quash of J. E. Speegle

Come now the defendants, * * *, J. E. Speegle, * * *, by their attorney, Edward E. Pringle; * * *, and respectfully move the court as follows:

I. To quash Count One of the Indictment herein on the ground that said Count does not allege facts which if proven to be true would constitute a criminal offense on the part of these defendants, or any of them.

II. To quash Count Two of said Indictment upon the ground that said Count does not allege facts which if proven to be true would constitute a criminal offense on the part of these defendants, or any of them.

III. To quash Counts One and Two of said indictment on the ground that said Counts do not allege facts which if proven to be true would constitute a criminal offense on the part of these defendants, or any of them, for the following among other reasons:

(a) That spirituous liquor and wines shipped into the State of Colorado, from producers located outside the State of Colorado, come under the exclusive control of the State of Colorado, after delivery within the state and before sale, and any alleged illegal conduct by these defendants with respect to such liquors is not an offense under the Sherman Act relating to interstate com-
42 merce but relates solely to intrastate commerce and is conduct over which the State of Colorado has exclusive jurisdiction;

(b) That under the Twenty-first Amendment to the Constitution of the United States the individual states are given control over intoxicating liquors within their respective borders, with supreme jurisdiction to prohibit such liquor absolutely, or to permit the sale of intoxicating liquors within the state and exclusively to prescribe all regulations relating to such sale within the state, without violating Article I, Section 8 (3), of the Federal Constitution and without violating any Federal laws, including the Sherman Act, enacted under such Commerce Clause.

IV. To quash Counts One and Two of said Indictment on the ground that said Indictment and each count thereof is so vague, ambiguous, indefinite, and uncertain as to fail to apprise these defendants of the nature and character of the accusations made against them and is so ambiguous, indefinite, and uncertain as to fail to advise these defendants of the proof that they must expect to meet upon any trial to be had, and so indefinite and uncertain in its allegations that these defendants are unable to prepare their defenses thereto.

V. To quash Counts One and Two of said Indictment on the ground that the facts therein alleged, if proven to be true, would constitute price fixing, so far as these defendants are concerned, of the type expressly permitted by and under the laws of the United States and the laws of the State of Colorado.

VI. To quash Counts One and Two of said Indictment on the ground that the facts therein alleged, if proven to be true, would as to these defendants, constitute solely the making and enforcing of contracts which are lawful by the express provisions of the Acts of the Congress of the United States and the statutes of the State of Colorado for the following, among other reasons, to wit: As to these defendants such contracts described in said Indictment were solely contracts relating to the sale or resale of commodities which bore the trade-mark, brand, or name of the producer of the same and which commodities were in free and open competi-
43 tion with commodities of the same general class produced by others; and such contracts described in said Indictment were not made between or among producers or between or among distributors or between or among wholesalers or between or among re-

tailers, but each such alleged contract was made between a producer who produced such commodities, on the one hand, and a distributor, wholesaler, or retailer who purchased from such producer the commodities, on the other hand.

VIII. To quash counts One and Two of said Indictment on the ground that said Indictment and each count thereof shows on its face that this court has no jurisdiction of the subject matter of this Indictment.

Respectfully submitted.

EDWARD E. PRINGLE,
Attorney for Defendants, J. E. Speegle,
720 Symes Building, Denver, Colorado.

Filed United States District Court, Denver, Colorado, July 10, 1942. G. Walter Bowman, Clerk.

In United States District Court

Demurrer of J. E. Speegle

Come now the defendants, J. E. Speegle, * * * by their attorney, Edward E. Pringle, and demure to the Indictment filed herein and to both Counts thereof, and as grounds therefor allege:

I. That the Indictment and each count thereof fails to state facts sufficient to constitute an offense against the laws of the United States by these defendants, or any of them.

II. That the Indictment and each count thereof is so vague, indefinite, and uncertain that it fails to apprise these defendants, or any of them, of the nature and cause of the accusation made against them, in violation of the Sixth Amendment to the Constitution of the United States.

III. That said Indictment and each count thereof and the
44 matters therein contained and the manner and form as the same are therein set forth are not sufficient in law.

IV. That said Indictment does not, nor does either count thereof, allege facts constituting or showing any offense by these defendants, or any of them, against any of the laws of the United States, for the following reasons, among others:

(a) That spirituous liquor and wines shipped into the State of Colorado, from producers located outside the State of Colorado, come under the exclusive control of the State of Colorado, after delivery within the State and before sale, and any alleged illegal conduct by these defendants with respect to such liquors is not an offense under the Sherman Act relating to interstate commerce but relates solely to intrastate commerce and is conduct over which the State of Colorado has exclusive jurisdiction;

(b) That under the Twenty-first Amendment to the Constitution of the United States the individual states are given control over intoxicating liquors within their respective borders, with supreme jurisdiction to prohibit such liquor absolutely, or to permit the sale of intoxicating liquors within the state and exclusively to prescribe all regulations relating to such sale within the state, without violating Article I, Section 8 (3), of the Federal Constitution and without violating any Federal laws, including the Sherman Act, enacted under such Commerce Clause.

V. That said Indictment and each count thereof shows on its face that this court has no jurisdiction in the premises or over the subject matter thereof and that the State of Colorado and the courts of said state have sole and exclusive jurisdiction concerning the subject matter of said indictment and the alleged violations of the law pertaining thereto.

EDWARD E. PRINGLE.
Attorney for Defendants. J. E. Speegle,
720 Symes Building, Denver, Colorado.

Filed United States District Court, Denver, Colorado. July 10, 1942. G. Walter Bowman, Clerk.

45 In United States District Court

Memorandum opinion

The sufficiency of this indictment returned March 12, 1942, is directly raised by numerous motions to quash and demurrers filed by the several defendants. Exhaustive arguments have been had and many briefs filed. Count 1 of the indictment charges a combination and conspiracy to raise, fix, and maintain the wholesale price of spirituous liquor and wines. The second count charges a similar combination and conspiracy to raise, fix, and maintain the retail prices of alcoholic beverages. Each count charges a violation of §1 of the Sherman Act.

In the arguments at the bar, and in the briefs of defendants, the issues made are that intoxicating liquor should be accorded a different status from other commodities in the application of the Sherman Act. The argument made is that by virtue of the 21st Amendment to the Constitution, transactions involving interstate sales of alcoholic beverages are removed from the operation of the Commerce Clause of the Federal Constitution and subject to the exclusive regulation of the several states after its arrival therein; and secondly, the charges contained in the indictment in question relate solely to wholesale and retail transactions within the State of Colorado—hence are not transactions in interstate commerce.

The indictment briefly (par. 18 to 21), describes the nature of the trade and commerce involved in the indictment, alleging that alcoholic beverages are marketed in Colorado by a continuous flow of shipments from producers located in other states to and through wholesalers and retailers in Colorado, to the consuming public; that 98%, or more, of all spirituous liquor consumed in Colorado is produced outside and shipped into the state and thus distributed.

Paragraph 22, count 1, charges that the defendants and the other persons unknown, engaged in a combination and conspiracy—

"to raise, fix, and maintain the wholesale prices of spirituous liquor and wines shipped into the State of Colorado from producers located outside of Colorado, by raising, fixing, and stabilizing wholesale mark-ups and margins of profit on such liquor and wines."

46 In count 2 of the indictment the charge is exactly the same, except it refers to fixing the retail prices.

It is further charged that the effect of the conspiracy charged is to raise, fix and stabilize, and the maintenance of a wholesale price in Colorado at levels acceptable to and approved by the defendants, thus eliminating price competition among the defendant wholesalers, and between the defendant wholesalers and other members of the defendant wholesale association in the sale and distribution of spirituous liquor and wines shipped into Colorado in interstate commerce, and restraining and suppressing interstate trade and commerce in spirituous liquors and wines not covered by producer-wholesaler fair trade contracts.

The first point we made by the defendants may be briefly disposed of. We cannot agree that by the 21st Amendment to the Constitution liquor was removed from interstate commerce, or that jurisdiction over it was thereby vested exclusively in the several states, nor that the said Amendment gave the individual states control over intoxicating liquor within their respective borders, with supreme jurisdiction to regulate or limit the sale thereof, without violating the Commerce Clause of the Federal Constitution and the Sherman Act.

We take judicial notice that the objective of the 21st Amendment was the repeal of the 18th Amendment. The proviso therein contained prohibiting the transportation or importation into a state for delivery or use in violation of the laws thereof of liquor was a saving clause to avoid a conflict with those states which at the time had their own state prohibition laws, or might thereafter adopt prohibition as a matter of state policy. The Amendment was never intended to deprive the Federal Government of any of its vast powers over interstate commerce be-

tween or among the states, and certainly was not designed to limit in the slightest degree the jurisdiction of the Federal Government for the power conferred upon it by the Commerce Clause of the Federal Constitution.

In Jameson v. Morgenthau, 307 U. S. 171, the Supreme Court held that there was no substance in the contention that the 21st Amendment gave the states any exclusive control over com-
47 merce in intoxicating liquors, unlimited by the Commerce Clause of the Federal Constitution. The Amendment simply gives the states the right to adopt or reject prohibition as a matter of state policy as they might see fit.

The power of Congress over interstate commerce is complete and can neither be enlarged nor diminished by the exercise or nonexercise of state power, and extends to those intrastate activities which so affect interstate commerce, or the exercise of the power of Congress over it, as to make their regulation an appropriate means to the attainment of a legitimate end.

In the case at bar the agreement denounced in the indictment may, for the sake *or* argument, be denominated as an intrastate activity or agreement. It nevertheless affected interstate commerce, because it regulated and prescribed the price at which liquor shipped by certain defendants—the producers—to other defendants—the wholesalers and retailer in Colorado—would be sold for consumption and resale there. Thus it is an intrastate activity affecting interstate commerce, and subject to the Sherman Act, U. S. v. Darby, 312 U. S. 100.

In reference to the Wilson Act, and the other similar acts discussed at length in some of the briefs in support of the motions, it is only necessary to say that they merely provide that liquors transported into any state and remaining there for use, shall upon arrival in such state be subject to the operation and effect of the laws of such state enacted in the exercise of its police power, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, whether imported in the original package or not. These acts were passed by the Congress to insure to the states complete control over intoxicating liquor, and remove from liquor shipped into a state the protection of the Interstate Commerce Clause, and make it subject at once to state regulation, in spite of the original package decisions.

As stated in In re Rahrer, 140 U. S. 545, at p. 560, Congress simply declared that liquor upon arrival in the state shall fall within the category of domestic articles of a similar nature. And in Clark Distilling Co. v. Western Maryland Ry. Co. and
48 State of West Va., 242 U. S. 311, the Supreme Court held the Webb-Kenyon Act withdrew from the immunity of

interstate commerce liquor shipped into a state for personal use, contrary to state law, and withdrew from shipments of liquor into states having prohibition the immunity of interstate commerce.

The most serious contention made, and one which has given the court the most trouble, is the argument that intoxicating liquor once delivered to a wholsaler in Colorado ceases to be in interstate commerce, and that agreements fixing the prices of liquor by such wholesalers and retailers within the state do not constitute violations of the Sherman Act, because interstate commerce has ceased prior to such sales.

The indictment, however, charges in effect that the fixing of the prices of the liquor after it had come into possession of the wholesalers in Colorado, was the result of a combination entered into by the producers in other states and the wholesalers and retailers in Colorado prior to the shipment of the liquors in question from the producer outside the state to the wholesalers and retailers within the state, for distribution to consumers. The producers are named as conspirators, and are included in the term "all of the defendants" used in paragraph 22 of the indictment.

It is also charged that the local defendants; that is the defendant wholesalers, and other members of the defendant wholesale association, and the retailers, undertook to induce and compel the defendant producers to enter into the producer-wholesaler fair trade contracts affecting the various brands of liquor shipped by the producers into Colorado, and thereby establish arbitrary and artificial wholesale prices embodying the arbitrary and non-competitive mark-up margins of profits agreed upon. In other words, the producers who manufacture and ship the liquor from outside of Colorado into the state, are directly charged with entering into the agreements to fix the price of the liquor after arrival here.

It is further alleged in paragraph 23 (e), that the defendants—including the producers—agreed to sell only at prices not lower, and at wholesale discounts not higher, than those established by said contracts, and that the wholesalers agreed among themselves, and with the producers, that
49 any wholesalers selling at other prices would be deprived of the opportunity to purchase such spirituous liquor and wines from defendant producers. This was a means adopted to enforce the unlawful conspiracy, and a direct interference with interstate commerce, and constituted, as stated in Local 167, International Brotherhood of Teamsters v. U. S., 291 U. S. 297, a burden on interstate commerce at the point of origin, and before the interstate journey began, and in the state of destination where

the interstate movement ended, and thus operated directly to restrain and monopolize interstate commerce. That case further held (p. 297): "The Sherman Act denounces every conspiracy in restraint of trade, including those that are to be carried on by acts constituting intrastate transactions."

In the Darby case, 312 U. S. 100, it was held, p. 114:

"The power of Congress over interstate commerce 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.' That power can neither be enlarged nor diminished by the exercise or nonexercise of state power. * * * Such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the states of destination; and is not prohibited unless by other Constitutional provisions."

P. 118:

"The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce."

P. 119:

"But it does not follow that Congress may not by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce. * * * But long before the adoption of the National Labor Relations Act this court
50 had many times held that the power of Congress to regulate interstate commerce extends to the regulation through legislative action of activities intrastate which have a substantial effect on the commerce or the exercise of the Congressional power over it."

P. 121:

"A familiar like exercise of power is the regulation of intrastate transactions which are so commingled with or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled."

And p. 122:

"The Sherman Act and the National Labor Relations Act are familiar examples of the exercion of the commerce power to pro-

hibit or control activities wholly intrastate because of their effect on interstate commerce."

It follows from these cases that the Sherman Act is broad enough to denounce restraints of trade carried out by acts themselves constituting intrastate transactions. See also Dr. Miles Medical Co. v. Park & Sons, 220 U. S. 373. There the court said that the agreement in question between druggists and jobbers and the retail druggists (p. 400):

"relate directly to interstate as well as intrastate trade, and operate to restrain trade or commerce among the several states, is also clear."

See also U. S. v. General Motors, 121 Fed. (2d) 376. It is said, p. 402:

"It is well settled that the Federal Government may under the Sherman Act regulate local commerce which is intimately related to interstate commerce or local activity which obstructs or burdens interstate commerce." (Citing cases.)

For the latest expression of the Supreme Court on this question see U. S. Univis Lens Corp., 316 U. S. 241, at p. 252:

"Agreements for price maintenance of articles moving in interstate commerce are, without more, unreasonable restraints within the meaning of the Sherman Act, because they eliminate competition."

And U. S. v. Masonite Corp., 316 U. S. 265 stated (p. 276):

51 "The fixing of prices by one member of a group, pursuant to express delegation, acquiescence, or understanding, is just as illegal as the fixing of prices by direct, joint action."

And this, irrespective of the fact that the combination may increase the distribution of the particular article in question without an increased price to the consumer; or the fact that from other points of view the arrangements might be deemed to have desirable consequences, would be no more a legal justification of price-fixing than were the "competitive evils" in the Socony-Vacuum case.

If we stop to consider the factual situation we find, as pointed out, that the producer who manufactured liquor outside of Colorado was a member of the conspiracy, the object of which was to compel him to agree to the price scale fixed by the local wholesalers and retailers in Colorado, and which affected the shipment of the producers' goods from the instant they entered interstate commerce en route to Colorado, and before they became at rest in the wholesalers' warehouses.

In 112 Fed. (2d) 417 (CCA 10th), the court said in Hayes case, speaking of the 21st Amendment:

"We do not regard it as a surrender of the power of Congress to prohibit or regulate the transportation of intoxicating liquor in interstate commerce."

It is contended that the defendants acted under the provisions of Colorado law. We find no act in Colorado authorizing a conspiracy to fix prices to the injury of competitors. In fact § 20 of the liquor code as amended, specifically provides that

"nothing herein shall be construed as delegating unto the licensing authority the power to fix prices."

Sec. 1 of the state Fair Trade Act refers only to the resale of commodities which are in free and open competition with commodities of the same general class produced or distributed by others. Here the burden of the Government's charge is that the defendants by the agreements in question have attempted to eliminate competition in their trade-mark brands.

It is a well-established rule of our jurisprudence that acts
52 consisting of a combination calculated to cause damage to others may be unlawful, and the power to punish such acts when done maliciously cannot be denied because they are to be followed and worked out by conduct which might have been lawful, if not preceded by the acts.

"The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law." Loewe v. Lawlor, 208 U. S. 274, at p. 299.

"Intent may make an otherwise innocent act criminal, if it is a step in a plot." Badders v. U. S. 240 U. S. 391, at p. 394.

"But the character of every act depends upon the circumstances in which it is done." Aikens v. Wisconsin, 195 U. S. 194, at pp. 205-6, cited with approval in Schenck v. U. S., 249 U. S. 47, at p. 52.

The law of these decisions is that; the Congressional power over interstate commerce includes conspiracies to be carried out solely by intrastate transactions; that the power of Congress over interstate commerce is complete in itself and can neither be enlarged nor diminished by the exercise or nonexercise of state power, and extends to intrastate activities which affect interstate commerce. The power of Congress to regulate interstate commerce extends to the regulation of intrastate activities having a substantial effect on the commerce or the Congressional power over it. And finally in case of conflict state power must give way to Federal.

This would seem to answer all of the contentions made in support of the several demurrers and motions to quash and require their overruling.

It is so ordered.

J. FOSTER SYMES, *District Judge.*

OCTOBER 10, 1942.

Filed United States District Court, Denver, Colorado, October 10, 1942. G. Walter Bowman, Clerk.

Entered on the Docket October 10, 1942.

In United States District Court

53 *Order Overruling Demurrers and Motions to Quash*
Oct. 10, 1942

This case having heretofore come on to be heard on the demurrers and motions to quash, of the various defendants, and having been argued by counsel, and briefs in support thereof having been filed herein, and the court having taken the matter under advisement, and being now fully advised in the premises; thereupon, upon consideration thereof and pursuant to a memorandum filed herein this day;

It is ordered by the court that the several demurrers and motions to quash be, and they are hereby overruled.

Entered on the Docket October 10, 1942.

In United States District Court

Order Quashing First Count of Indictment etc.

Nov. 20, 1942

At this day comes Thomas J. Morrissey, Esquire, District Attorney, who prosecutes the pleas of the United States in this behalf and James McI. Henderson, Esquire, Special Attorney for the prosecution of the above-entitled case also comes; and the defendants * * * Hiram Walker, Incorporated; Seagram Distillers Corporations; Schenley Distillers Corporation; Brown Forman Distillers Corporation; Frankfort Distilleries, Incorporated; National Distillers Products Corporation; McKesson & Robbins, Incorporated, and J. E. Speegle in their own proper persons and by their officers, and * * * Charles Rosenbaum, W. W. Grant, Robert E. More, Robert G. Bosworth; William V. Hodges and Morris Rifkin, Esquires, their attorneys, also come.

And the various motions of the defendants to quash the
54 indictment herein and to require the plaintiff to elect upon which count of the indictment it will proceed, having heretofore come on to be heard and having been ruled on by the court, thereupon, the district attorney saith that he will and doth hereby elect to stand upon the second count of the indictment herein.

Thereupon, it is ordered by the court that the first count of the indictment herein be, and the same is hereby, quashed, and that the defendants of and from the premises in the first count of this said indictment specified be discharged and go hence hereof without day.

Thereupon, the defendants are arraigned and the defendants * * * Hiram Walker, Incorporated, by E. N. Sturman, its president; Seagram Distillers Corporation, by W. W. Grant, Esquire, its attorney; Schenley Distillers Corporation, by Milton J. Nauheim, its executive vice-president; Brown-Forman Distillers Corporation and Frankfort Distilleries, Incorporated, by Robert G. Bosworth, their attorney; National Distillers Products Corporation, by Wm. V. Hodges, Esquire, its attorney; McKesson & Robbins, Incorporated, by W. W. Grant, its attorney; and J. E. Speegle, each for himself and not one for the other pleads not guilty to the second count of the indictment herein, and of this they put themselves upon the country and the district attorney doth the like.

And the separate motions of the defendants for a bill of particulars coming on now to be heard are argued by counsel. And the court having considered the same and being now fully advised in the premises:

It is ordered by the court that an order be drawn in accordance with the court's ruling and presented to the court for its signature.

Entered on the Docket November 20, 1942.

In United States District Court

Ruling of the Court on Motions for Bills of Particulars

The Court: Referring to that part of the bill of particulars of the defendants McKesson & Robbins et al., beginning on page 4, and directed to the second count of the indictment, it is ordered:

55 Paragraph 10, subdivisions (a) and (b), are denied.

Subdivision (c), the government will state whether the conspiracy charged was by express agreement or implied agreement; if express, the time and place when it was entered into; if implied, the names of some of the individuals defendant or cor-

porate representatives who acted for each of the moving defendants, so they can identify the particular meeting or transaction referred to.

Subdivision (d), state as accurately as the government can the time each defendant entered into the alleged combination or conspiracy but not necessarily the place.

Paragraph 11 is denied.

Paragraph 12, the government will state whether the alleged agreement was in writing; and if so, identify any writings relied upon.

Paragraph 13, the government will state which of the defendants voluntarily entered into this conspiracy and what defendants were persuaded or forced into it. Subdivisions (c), (d), and (e) will be denied.

Paragraph 14, the government will state whether the alleged agreement to compel producers and wholesalers to enter into fair trade contracts as alleged in said paragraph was expressed or implied; and if express, identify any written documents covering the same; and if oral, the time, about, and the place where it was entered into.

Paragraph 15 is denied.

Paragraph 16, the government will state whether the alleged agreement to revise retail prices established was express or implied; and if express, the nature thereof and identify the writings, if any.

Paragraph 17, the government will furnish the names of the wholesalers, producers, and retailers who were boycotted, as alleged.

Paragraph 18, subdivision (2), the names of the officials of the State of Colorado and of the City of Denver whom the defendants attempted to induce to reject applications for retail liquor licenses as alleged in paragraph 31 (h); and (b) the names of the applicants for retail liquor licenses referred to in said paragraph.

56 Paragraph 19 is denied.

Paragraph 20 (a) and (b) of the motion will be denied.

All the information to be furnished by this order shall be furnished to the best ability of the government to each moving defendant, and in the event the government cannot comply, or the defendants are not satisfied with the statement made, counsel may come into court for discussion and further ruling on any omissions or objections to the bill of particulars as furnished. This bill of particulars will be furnished by the 15th of December. Plaintiff may have the privilege of amending it thereafter at any time up to ten days before the date this case is set for the trial.

All other motions for bills of particulars are hereby overruled and denied.

J. FOSTER SYMES, *U. S. District Judge.*

NOVEMBER 24, 1942.

Filed United States District Court, Denver, Colorado, November 24, 1942. G. Walter Bowman, Clerk.
Entered on the Docket November 24, 1942.

In United States District Court

Judgment as to Hiram Walker, Incorporated

July 28, 1943

At this day comes Thomas J. Morrissey, Esquire, District Attorney, and James McI. Henderson, Esquire, Special Assistant to the Attorney General, who prosecutes the above-entitled case, and the defendant, Hiram Walker, Inc., by Harry K. Nier, District Manager, its designated officer, and by Charles Rosenbaum, Esquire, its attorney, also comes.

And thereupon the defendant, Hiram Walker, Inc., by its designated officer, now withdraws its former plea of not guilty to the second count of the indictment herein and presents to the court now here its plea of nolo contendere
57 and prays the court to pass sentence upon it in all things as if it had pleaded guilty to the indictment herein. And the consequences and effects thereof being now here fully explained, it still persists therein.

Wherefore, it is considered and adjudged by the court upon the plea of nolo contendere that the defendant, Hiram Walker, Inc., is guilty of a conspiracy to violate the Sherman Act and for having committed the crime aforesaid is by the court sentenced to pay to the United States of America a fine of Thirty-Five Hundred Dollars ($3,500.00) and that the United States have execution therefor.

Thereupon, it is ordered by the court that the defendant have to and including the fourth day of August, A. D. 1943, within which to pay said fine.

Entered on the Docket July 28, 1943.

In United States District Court

Judgment as to Seagram-Distillers Corporation

July 28, 1943

At this day comes Thomas J. Morrissey, Esquire, District Attorney, and James McI. Henderson, Esquire, Special Assistant to

the Attorney General, who prosecutes the above-entitled case, and the defendant, Seagram-Distillers Corporation, by Arthur L. Franzen, its designated officer, and by W. W. Grant, Esquire, its attorney, also comes.

And thereupon the defendant, Seagram-Distillers Corporation, by its designated officer, now withdraws its former plea of not guilty to the second count of the indictment herein and presents to the court now here its plea of nolo contendere and prays the court to pass sentence upon it in all things as if it had pleaded guilty to the indictment herein. And the consequences and effects thereof being now here fully explained, it still persists therein.

Wherefore, it is considered and adjudged by the court upon the plea of nolo contendere that the defendant, Seagram-Distillers Corporation, is guilty of a conspiracy to violate the Sherman Act and for having committed the crime aforesaid is by the court sentenced to pay to the United States of America a fine of
58 Thirty-Five Hundred Dollars ($3,500.00) and that the United States have execution therefor.

Thereupon, it is ordered by the court that the defendant have to and including the fourth day of August, A. D. 1943, within which to pay said fine.

Entered on the Docket July 28, 1943.

In United States District Court

Judgment as to Schenley Distillers Corporation

July 28, 1943

At this day comes Thomas J. Morrissey, Esquire, District Attorney, and James McI. Henderson, Esquire, Special Assistant to the Attorney General, who prosecutes the above-entitled case, and the defendant, Schenley Distillers Corporation, by Jerry Schoenwald, its designated officer, and by Ira C. Rothgerber, Esquire, its attorney, also comes.

And thereupon the defendant, Schenley Distillers Corporation, by its designated officer, now withdraws its former plea of not guilty to the second count of the indictment herein and presents to the court now here its plea of nolo contendere and prays the court to pass sentence upon it in all things as if it had pleaded guilty to the indictment herein. And the consequences and effects thereof being now here fully explained, it still persists therein.

Wherefore, it is considered and adjudged by the court upon the plea of nolo contendere that the defendant, Schenley Distillers Corporation, is guilty of a conspiracy to violate the Sherman Act and for having committed the crime aforesaid is by the court sen-

tenced to pay to the United States of America a fine of Three Thousand Dollars ($3,000.00) and that the United States have execution therefor.

Thereupon, it is ordered by the court that the defendant have to and including the fourth day of August, A. D. 1943, within which to pay said fine.

Entered on the Docket July 28, 1943.

59 In United States District Court

Judgment as to Frankfort Distilleries, Inc.

July 28, 1943

At this day comes Thomas J. Morrissey, Esquire, District Attorney, and James McI. Henderson, Esquire, Special Assistant to the Attorney General, who prosecutes the above-entitled case, and the defendant, Frankfort Distilleries, Inc., by Earl L. Whitacre, its designated officer, *and* and by Robert G. Bosworth, Esquire, its attorney, also comes.

And thereupon the defendant, Frankfort Distilleries, Inc., by its designated officer, now withdraws its former plea of not guilty to the second count of the indictment herein and presents to the court now here its plea of nolo contendere and prays the court to pass sentence upon it in all things as if it had pleaded guilty to the indictment herein. And the consequences and effects thereof being now here fully explained, it still persists therein.

Wherefore, it is considered and adjudged by the court upon the plea of nolo contendere that the defendant, Frankfort Distilleries, Inc., is guilty of a conspiracy to violate the Sherman Act and for having committed the crime aforesaid is by the court sentenced to pay to the United States of America a fine of Three Thousand Dollars ($3,000.00) and that the United States have execution therefor.

Thereupon, it is ordered by the court that the defendant have to and including the fourth day of August, A. D. 1943, within which to pay said fine.

Entered on the Docket July 28, 1943.

In United States District Court

Judgment as to McKesson & Robbins, Incorporated

July 28, 1943

At this day comes Thomas J Morrissey, Esquire, District Attorney, and James McI. Henderson, Esquire, Special Assistant to

the Attorney General, who prosecutes the above-entitled case, and the defendant, McKesson & Robbins, Inc., by L. A. Works, its designated officer, and by W. W. Grant, Esquire, its attorney, also comes.

And thereupon the defendant, McKesson & Robbins, Inc., by its designated officer, now withdraws its former plea
60 of not guilty to the second count of the indictment herein and presents to the court now here its plea of nolo contendere and prays the court to pass sentence upon it in all things as if it had pleaded guilty to the indictment herein. And the consequences and effects thereof being now here fully explained, it still persists therein.

Wherefore, it is considered and adjudged by the court upon the plea of nolo contendere that the defendant, McKesson & Robbins, Inc., is guilty of a conspiracy to violate the Sherman Act and for having committed the crime aforesaid is by the court sentenced to pay to the United States of America a fine of Three Thousand Dollars ($3,000.00) and that the United States have execution therefor.

Thereupon, it is ordered by the court that the defendant have to and including the fourth day of August, A. D. 1943, within which to pay said fine.

Entered on the Docket July 28, 1943.

In United States District Court

Judgment as to National Distillers Products Corporation

July 28, 1943

At this day comes Thomas J. Morrissey, Esquire, District Attorney, and James McI. Henderson, Esquire, Special Assistant to the Attorney General, who prosecutes the above-entitled case, and the defendant, National Distillers Products Corporation, by Henry C. Vidal, its designated officer, and by William V. Hodges, Esquire, and Henry C. Vidal, Esquire, its attorneys, also comes.

And thereupon the defendant, National Distillers Products Corporation, by its designated officer, now withdraws its former plea of not guilty to the second count of the indictment herein and presents to the court now here its plea of nolo contendere and prays the court to pass sentence upon it in all things as if it had pleaded guilty to the indictment herein. And the consequences and effects thereof being now here fully explained, it still persists therein.

Wherefore, it is considered and adjudged by the court upon the plea of nolo contendere that the defendant, National Distil-
61 lers Products Corporation, is guilty of a conspiracy to violate the Sherman Act and for having committed the crime

aforesaid is by the court sentenced to pay to the United States of America a fine of Three Thousand Dollars ($3,000.00) and that the United States have executed therefor.

Thereupon, it is ordered by the court that the defendant have to and including the fourth day of August, A. D. 1943, within which to pay said fine.

Entered on the Docket July 28, 1943.

In United States District Court

Judgment as to Brown Forman Distillers Corporation

July 28, 1943

At this day comes Thomas J. Morrissey, Esquire, District Attorney, and James McI. Henderson, Esquire, Special Assistant to the Attorney General, who prosecutes the above-entitled case, and the defendant, Brown-Forman Distillers Corporation, by Leo Sullivan, its designated officer, and by Robert E. More, Esquire, its attorney, also comes.

And thereupon the defendant, Brown-Forman Distillers Corporation, by its designated officer, now withdraws its former plea of not guilty to the second count of the indictment herein and presents to the court now here its plea of nolo contendere and prays the court to pass sentence upon it in all things as if it had pleaded guilty to the indictment herein. And the consequences and effects thereof being now here fully explained, it still persists therein.

Wherefore, it is considered and adjudged by the court upon the plea of nolo contendere that the defendant, Brown-Forman Distillers Corporation, is guilty of a conspiracy to violate the Sherman Act and for having committed the crime aforesaid is by the court sentenced to pay to the United States of America a fine of Twenty-Five Hundred Dollars ($2,500.00) and that the United States have execution therefor.

Thereupon, it is ordered by the court that the defendant have to and including the fourth day of August, A. D. 1943, within which to pay said fine.

Entered on the Docket July 28, 1943.

62 In United States District Court

Judgment as to J. E. Speegle

July 28, 1943

At this day comes Thomas J. Morrissey, Esquire, District Attorney, and James McI. Henderson, Esquire, Special Assistant to

the Attorney General, who prosecutes the above-entitled case, and the defendant, J. E. Speegle, in his own proper person, and by Morris Rifkin, Esquire, his attorney, also comes.

And thereupon the defendant, J. E. Speegle, now withdraws his former plea of not guilty to the second count of the indictment herein and presents to the court now here his plea of nolo contendere and prays the court to pass sentence upon him in all things as if he had pleaded guilty to the indictment herein. And the consequences and effects thereof being now here fully explained, he still persists therein.

Wherefore, it is considered and adjudged by the court upon the plea of nolo contendere that the defendant, J. E. Speegle, is guilty of a conspiracy to violate the Sherman Act and for having committed the crime aforesaid is by the court sentenced to pay to the United States of America a fine of Twenty-Five Hundred Dollars ($2,500.00) and that the United States have execution therefor.

Thereupon, it is ordered by the court that the defendant have to and including the fourth day of August, A. D. 1943, within which to pay said fine.

Entered on the Docket July 28, 1943.

In United States District Court

Notice of Appeal

Name and address of Appellant: Hiram Walker, Incorporated, Peoria, Illinois.

Name and address of appellant's attorney: Charles Rosenbaum, 930 University Building, Denver, Colorado.

Offense: The second count of the indictment on which
63 the government has elected to rely, charged a conspiracy to restrain interstate commerce in violation of the Sherman Act (15 U. S. C. A., Section 1).

Date of Judgment: July 28, 1943.

Brief description of judgment or sentence: The defendant was fined Three Thousand Five Hundred Dollars ($3,500.00).

We, the above-named appellant, do hereby appeal to the United States Circuit Court of Appeals for the Tenth Circuit from the judgment above-mentioned on the grounds set forth below.

[CORPORATE SEAL] HIRAM WALKER, INCORPORATED,
By FLETCHER RUARK,
Vice President.

Dated July 28, 1943.

Grounds of Appeal

The appellant contends that the second count of the indictment does not state facts constituting a crime committed by this appellant; that the second count of the indictment does not charge an offense under the Sherman Act for the reason that the acts charged in the second count of the indictment related to a commodity which had ceased to be in interstate commerce and which was solely in intrastate commerce; that the second count of the indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act; that the second count of the indictment does not state facts sufficient to charge an offense under the Sherman Act committed by this appellant; that the allegations of the second count of the indictment are so vague, ambiguous, indefinite, and uncertain as to be in violation of the Sixth Amendment to the Constitution of of the United States; and that the acts in the second count of the indictment charged to the appellant were performed under the sanction of the laws of the State of Colorado; that the sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and Laws of the United States; that the trial court erred in the following respects: (a) In overruling the defendant's Demurrer to the Second Count of the indictment; and
64 (b) in overruling the defendant's motion to quash the second count of the indictment.

CHARLES ROSENBAUM,
Attorney for the Appellant,
Hirman Walker, Incorporated,
930 University Building, Denver, Colorado.

Filed United States District Court, Denver, Colorado, July 28, 1943. G. Walter Bowman, Clerk.

In United States District Court

Notice of Appeal

Name and address of Appellant: Seagram-Distillers Corporation, New York City.

Name and address of appellant's attorney: W. W. Grant, 730 Equitable Building, Denver, Colorado.

Offense: The second count of the indictment to restrain interstate commerce in violation of the Sherman Act, (15 U. S. C. A., Section 1).

Date of Judgment: July 28, 1943.

Brief description of judgment or sentence: The defendant was fined Thirty-five Hundred Dollars ($3,500).

The above-named appellant does hereby appeal to the United States Circuit Court of Appeals for the Tenth Circuit from the judgment above-mentioned on the grounds set forth below.

SEAGRAM-DISTILLERS CORPORATION.
By A. L. FRANZEN.

Dated July 28, 1943.

Grounds of Appeal

The appellant contends that the second count of the indictment does not state facts constituting a crime committeed by this appellant; that the second count of the indictment does not charge an offense under the Sherman Act for the reason that the acts charged in the second count of the indictment related to a commodity which had ceased to be in interstate commerce and which was solely in intrastate commerce: that the second count of the indictment is fatally defective in that it does not charge
65 an agreement among the defendants to accomplish an illegal act: that the second count of the indictment does not state facts sufficient to charge an offense under the Sherman Act committed by this appellant: that the allegations of the second count of the indictment are so vague, ambiguous, indefinite, and uncertain as to be in violation of the Sixth Amendment to the Constitution of the United States: and that the acts in the second count of the indictment charged to the appellant were performed under the sanction of the laws of the State of Colorado: that the sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and Laws of the United States: that the trial court erred in the following respects: In overruling the defendant's Motion to Quash and Demurrer to the Second Count of the Indictment.

W. W. GRANT,
Attorney for the Appellant,
Seagram-Distillers Corporation,
730 Equitable Building, Denver, Colorado.

Filed United States District Court, Denver, Colorado, July 28, 1943. G. Walter Bowman, Clerk.

In United States District Court

Notice of Appeal

Name and address of Appellant: Schenley Distillers Corporation, 350 Fifth Avenue, New York City, New York.

Name and address of Appellant's attorney: Robert S. Marx, 900 Traction Building, Cincinnati, Ohio; Rothgerber & Appel, 630 Symes Building, Denver, Colorado.

Offense: The second count of the indictment, on which the Government has elected to rely, charged a conspiracy to restrain interstate commerce in violation of the Sherman Act (15 U. S. C. A. Section 1).

Date of Judgment: July 28, 1943.

Brief description of judgment or sentence: The defendant was fined Three Thousand Dollars ($3,000.00).

We, the above named appellant, do hereby appeal to the United States Circuit Court of Appeals for the Tenth Circuit from the judgment above-mentioned on the grounds set forth below.

66

SCHENLEY DISTILLERS CORPORATION,
By IRA C. ROTHGERBER,
Attorney-in-fact.

Dated July 28, 1943.

Grounds of Appeal

The appellant contends that the second count of the indictment does not state facts constituting a crime committed by this appellant; that the second count of the indictment does not charge an offense under the Sherman Act for the reason that the acts charged in the second count of the indictment related to a commodity which had ceased to be in inter-state commerce and which was solely in intra-state commerce; that the second count of the indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act; that the second count of the indictment does not state facts sufficient to charge an offense under the Sherman Act committed by this appellant; that the allegations of the second count of the indictment are so vague, ambiguous, indefinite and uncertain as to be in violation of the Sixth Amendment to the Constitution of the United States; that the acts in the second count of the indictment charged to the appellant were performed under the sanction of the laws of the State of Colorado; that the sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and Laws of the United States; that the trial court erred in the following respects: (a) In overruling the defendant's Demurrer to the Second Count of the Indictment; and (b) In overruling the defendant's Motion to Quash the Second Count of the Indictment.

ROBERT S. MARX,
IRA C. ROTHGERBER,
Attorneys for the Appellant,
Schenley Distillers Corporation.

Filed United States District Court, Denver, Colorado, July 28, 1943. G. Walter Bowman, Clerk.

67 In United States District Court

Notice of Appeal

Name and address of Appellant: Frankfort Distilleries, Inc., Louisville, Kentucky.

Names and addresses of Appellant's attorneys: Henry E. McElwain, Jr., Kentucky Home Life Building, Louisville, Kentucky; Robert G. Bosworth, Winston S. Howard, Pershing, Bosworth, Dick & Dawson, 520 Equitable Building, Denver, Colorado.

Offense: The second count of the indictment, on which the Government has elected to rely, charged a conspiracy to restrain interstate commerce in violation of the Sherman Act (15 U. S. C. A. Section 1).

Date of Judgment: July 28, 1943.

Brief description of judgment or sentence: The defendant was fined Three Thousand Dollars ($3,000.00).

We, the above-named appellant, do hereby appeal to the United States Circuit Court of Appeals for the Tenth Circuit from the judgment above-mentioned on the grounds set forth below.

FRANKFORT DISTILLERS, INC.
By EARL N. WHITACRE.

Dated July 28, 1943.

Grounds of Appeal

The appellant contends that the second count of the indictment does not state facts constituting a crime committed by this appellant; that the second count of the indictment does not charge an offense under the Sherman Act for the reason that the acts charged in the second count of the indictment related to a commodity which had ceased to be in interstate commerce and which was solely in intrastate commerce; that the second count of the indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act; that the second count of the indictment does not state facts sufficient to charge an offense under the Sherman Act committed by this appellant; that the allegations of the second count of the indictment

68 are so vague, ambiguous, indefinite and uncertain as to be in violation of the Sixth Amendment to the Constitution of the United States; and that the acts in the second count of the indictment charged to the appellant were performed under the sanction of the laws of the State of Colorado; that the sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and Laws of the United States; that the trial court erred in the following respects: (a) In overruling the de-

fendant's demurrer to the Second Count of the Indictment; and (b) In overruling the defendant's motion to quash the Second Count of the Indictment.

ROBERT G. BOSWORTH, WINSTON S. HOWARD,
Attorneys for Appellant, Frankfort Distilleries, Inc.
PERSHING, BOSWORTH, DICK & DAWSON,
Of Counsel.

Field United States District Court, Denver, Colorado, July 28, 1943. G. Walter Bowman, Clerk.

In United States District Court

Notice of Appeal

Name and address of Appellant: McKesson & Robbins, Incorporated, Denver, Colorado.

Name and address of appellant's attorney: W. W. Grant, 730 Equitable Building, Denver, Colorado.

Offense: The second count of the indictment, on which the Government elected to rely, charged a conspiracy to restrain interstate commerce in violation of the Sherman Act (15 U. S. C. A. Section 1).

Date of Judgment: July 28, 1943.

Brief description of judgment or sentence: The defendant was fined Three thousand Dollars ($3,000.00).

The above named appellant, does hereby appeal to the
69 United States Circuit Court of Appeals for the Tenth Circuit from the judgment above-mentioned on the grounds set forth below.

[SEAL] McKESSON & ROBBINS, INCORPORATED.
By W. J. MURRAY, JR.

Dated July 28, 1943.

Grounds of Appeal

The appellant contends that the second count of the indictment does not state facts constituting a crime committed by this appellant; that the second count of the indictment does not charge an offense under the Sherman Act for the reason that the acts charged in the second count of the indictment related to a commodity which had ceased to be in interstate commerce and which was solely in intrastate commerce; that the second count of the indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act; that the second count of the indictment does not state facts sufficient to charge an offense

under the Sherman Act committed by this appellant; that the allegations of the second count of the indictment are so vague, ambiguous, indefinite and uncertain as to be in violation of the Sixth Amendment to the Constitution of the United States; that the acts in the second count of the indictment charged to the appellant were performed under the sanction of the laws of the State of Colorado; that the sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and Laws of the United States; that the trial court erred in the following respects: In overruling the defendant's Motion to Quash and Demurrer to the Second Count of the Indictment.

W. W. GRANT,
Attorney for the Appellant,
McKesson & Robbins, Incorporated,
730 Equitable Building, Denver, Colorado.

Filed United States District Court, Denver, Colorado, July 28, 1943. G. Walter Bowman, Clerk.

70 In United States District Court

Notice of Appeal

Name and address of Appellant: National Distillers Products Corporation, 120 Broadway, New York City, N. Y.

Name and Address of Appellant's attorney: Hodges, Vidal & Goree, Wm. V. Hodges, and Henry C. Vidal, 947 Equitable Building, Denver 2, Colorado.

Offense: The second count of the indictment, on which the Government has elected to rely, charged a conspiracy to restrain interstate commerce in violation of the Sherman Act (15 U.S.C.A. Section 1).

Date of Judgment: July 28, 1943.

Brief description of judgment or sentence: The defendant was fined three thousand dollars ($3,000).

The above named appellant does hereby appeal to the United States Circuit Court of Appeals for the Tenth Circuit from the judgment above mentioned on the grounds set forth below.

NATIONAL DISTILLERS PRODUCTS CORPORATION,
By WM. V. HODGES & HENRY C. VIDAL,
Its attorneys.

Dated July 28, 1943.

Grounds of Appeal

The appellant contends that the second count of the indictment does not state facts constituting a crime committed by this appel-

lant; that the second count of the indictment does not charge an offense under the Sherman Act for the reason that the acts charged in the second count of the indictment related to a commodity which had ceased to be in interstate commerce and which was solely in intrastate commerce; that the second count of the indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act; that the second count of the indictment does not state facts sufficient to charge an
71 offense under the Sherman Act committed by this appellant; that the allegations of the second count of the indictment are so vague, ambiguous, indefinite and uncertain as to be in violation of the Sixth Amendment to the Constitution of the United States; that the acts in the second count of the indictment charged to the appellant were performed under the sanction of the laws of the State of Colorado; that the sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and laws of the United States; that the trial court erred in the following respects: (a) In overruling the defendant's Demurrer to the Second Count of the Indictment; and (b) in overruling the defendant's Motion to Quash the Second Count of the Indictment.

WM. V. HODGES,
HENRY C. VIDAL,
HODGES, VIDAL & GOREE,
Attorneys for the Appellant,
National Distillers Products Corporation.

Filed United States District Court, Denver, Colorado, July 28, 1943. G. Walter Bowman, Clerk.

In United States District Court

Notice of Appeal

Name and address of Appellant: Brown Forman Distillers Corporation, Louisville, Kentucky.

Name and address of Appellant's attorney: Dines, Dines & Holme, Robert E. More, 1210 First National Bank Building, Denver, Colorado.

Offense: The second count of the indictment, on which the Government has elected to rely, charged a conspiracy to restrain interstate commerce in violation of the Sherman Act (15 U. S. C. A. Section 1).

Date of Judgment: July 28, 1943.

Brief description of judgment or sentence: The defendant was fined Twenty-five hundred Dollars ($2,500.00).

We, the above-named appellant, do hereby appeal to the United States Circuit Court of Appeals for the Tenth
72 Circuit from the judgment above-mentioned on the grounds set forth below.

BROWN FORMAN DISTILLERS CORPORATION.
By LEO SULLIVAN.

Dated July 28, 1943.

Grounds of Appeal

The appellant contends that the second count of the indictment does not state facts constituting a crime committed by this appellant; that the second count of the indictment does not charge an offense under the Sherman Act for the reason that the acts charged in the second count of the indictment related to a commodity which had ceased to be in interstate commerce and which was solely in intrastate commerce; that the second count of the indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act; that the second count of the indictment does not state facts sufficient to charge an offense under the Sherman Act committed by this appellant; that the allegations of the second count of the indictment are so vague, ambiguous, indefinite and uncertain as to be in violation of the Sixth Amendment to the Constitution of the United States; that the acts in the second count of the indictment charged to the appellant were performed under the sanction of the laws of the State of Colorado; that the sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and Laws of the United States; that the trial court erred in the following respects: (a) In overruling the defendant's Demurrer to the Second Count of the Indictment; and (b) In overruling the defendant's Motion to Quash the Second Count of the Indictment.

DINES, DINES & HOLME, ROBERT E. MORE,
Attorneys for the Appellant.

Filed United States District Court, Denver, Colorado, July 28, 1943. G. Walter Bowman, Clerk.

73 In United States District Court

Notice of Appeal

Name and Address of Appellant: J. E. Speegle, Denver, Colorado.

Names and address of appellant's attorney: Morris Rifkin, 720 Symes Building, Denver, Colorado.

Offense: The second count of the indictment, on which the Government elected to rely, charged a conspiracy to restrain interstate commerce in violation of the Sherman Act (15 U. S. C. A., Section 1).

Date of Judgment: July 28, 1943.

Brief description of judgment or sentence: The defendant was fined Twenty-five hundred Dollars ($2,500.00).

The above-named appellant, does hereby appeal to the United States Circuit Court of Appeals for the Tenth Circuit from the judgment above-mentioned on the grounds set forth below.

J. E. SPEEGLE.

Dated July 28, 1943.

Grounds of Appeal

The appellant contends that the second count of the indictment does not state facts constituting a crime committed by this appellant; that the second count of the indictment does not charge an offense under the Sherman Act for the reason that the acts charged in the second count of the indictment related to a commodity which had ceased to be an interstate commerce and which was solely in intrastate commerce; that the second count of the indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act; that the second count of the indictment does not state facts sufficient to charge an offense under the Serman Act committed by this appellant; that the allegations of the second count of the indictment are so vague, ambiguous, indefinite and uncertain as to be in violation of the Sixth Amendment to the Constitution of the United States; that the acts in the second count of the indictment charged to the appellant were performed under the sanction of the laws of the State of Colorado; that the sole jurisdiction over such acts
74 was vested in the State of Colorado by the Constitution and Laws of the United States; that the trial court erred in the following respects: In overruling the defendant's Motion to Quash and Demurrer to the Second Count of the Indictment.

MORRIS RIFKIN,
Attorney for Appellant,
J. E. Speegle,
720 Symes Building, Denver, Colorado.

Filed United States District Court, Denver, Colorado, July 28, 1943. G. Walter Bowman, Clerk.

In United States District Court

Order Fixing Amount of Appearance Bond, etc., as to Hiram Walker, Incorporated

This matter coming on to be heard this twenty-eighth day of July 1943, for the purpose of fixing the terms of the escrow deposit referred to herein and the amount of the appearance bond of the defendant, Hiram Walker, Inc., hereinafter referred to as the appellant, the said appellant being represented before this court by Charles Rosenbaum, its attorney; and the court having assessed a fine against the said appellant upon its plea of nolo contendere in the sum of Three Thousand Five Hundred Dollars ($3,500.00);

It Is Hereby Ordered That the appearance bond of the said appellant is fixed in the amount of two hundred fifty dollars ($250.00);

It is further ordered that the appellant deposit with the clerk of this court, on or before the 4th day of August 1943, cash in the sum of three thousand seven hundred fifty dollars ($3,750.00), to be held by the clerk in escrow in the registry of the court until the determination of the appellant's appeal in the said cause, subject to further order of this court.

It is further ordered, that in the event the said sentence is reversed, the said total sum (less costs, if any) shall be returned to the said Hiram Walker, Inc., upon order of this court.

It is further ordered, that in the event the said sentence is affirmed, the said sum of Three Thousand Seven Hundred Fifty Dollars ($3,750.00) shall be applied to the said judg-
75 ment and in full payment of said fine, and so much of the said sum of Two Hundred Fifty Dollars ($250.00) as shall be necessary to pay costs herein shall be applied to such costs, both in full payment of the judgment and sentence, and the balance thereof shall be paid to the said Hiram Walker, Inc., upon order of this court.

It is further ordered, that the sum of two hundred fifty dollars ($250.00) so deposited shall be security for the appearance bond of the said appellant filed herewith, and no surety shall be required on the said bond.

Done in open court the day and year first above mentioned.

By the court:

J. FOSTER SYMES, *Judge.*

Filed United States District Court, Denver, Colorado, July 28, 1943. G. Walter Bowman, Clerk.

Entered on the Docket July 28, 1943.

In United States District Court

Order Fixing Amount of Appearance Bond etc. as to Seagram-Distillers Corporation

This matter coming on to be heard this twenty-eighth day of July, 1943, for the purpose of fixing the terms of the escrow deposit referred to herein and the amount of the Appearance Bond of the defendant, Seagram-Distillers Corporation, hereinafter referred to as the appellant, the said appellant being represented before this court by W. W. Grant, its attorney; and the court having assessed a fine against the said appellant upon his plea of nolo contendere in the sum of Thirty-five hundred Dollars ($3,500.00);

It Is Hereby Ordered, That the Appearance Bond of the said appellant is fixed in the amount of Two Hundred Fifty Dollars ($250 00);

It Is Further Ordered, That the appellant deposit with the clerk of this court, on or before the 4th day of August, 1943, cash in the sum of Three Thousand Seven hundred fifty Dollars ($3,750.00) to be held by the Clerk in escrow in the Registry
76 of the Court until the determination of the appellant's appeal in the said cause, subject to further Order of this court.

It Is Further Ordered, That in the event the said sentence is reversed, the said total sum (less costs, if any) shall be returned to the said Seagram Distillers Corporation, upon Order of this court.

It Is Further Ordered, That in the event the said sentence is affirmed, the said sum of Thirty-five Hundred Dollars ($3,500.00) shall be applied to the said judgment and in full payment of said fine, and so much of the said sum of Two Hundred Fifty Dollars ($250.00) as shall be necessary to pay costs herein shall be applied to such costs, both in full payment of the judgment and sentence, and the balance thereof shall be paid to the said Seagram-Distillers Corporation upon Order of this court.

It Is Further Ordered, That the sum of Two Hundred Fifty Dollars ($250.00) so deposited shall be security for the Appearance Bond of the said appellant filed herewith, and no surety shall be required on the said bond.

Done in open court the day and year first above mentioned.

By the court:

J. Foster Symes, *Judge.*

Filed United States District Court, Denver, Colorado, July 28, 1943. G. Walter Bowman, Clerk.

Entered on the Docket July 28, 1943.

In United States District Court

Order Fixing Amount of Appearance Bond etc. as to Schenley-Distillers Corporation

This matter coming on to be heard this twenty-eighth day of July, 1943, for the purpose of fixing the terms of the escrow deposit referred to herein and the amount of the Appearance Bond of the defendant Schenley Distillers Corporation, hereinafter referred to as the appellant, the said appellant being represented before this Court by Robert S. Marx and Ira C. Rothgerber, its attor-
77 neys; and the Court having assessed a fine against the said appellant upon his plea of nolo contendere in the sum of Three Thousand Dollars ($3,000.00).

It is Hereby Ordered, That the Appearance Bond of the said appellant is fixed in the amount of Two Hundred Fifty Dollars ($250.00);

It is Further Ordered, That the appellant deposit with the Clerk of this Court, on or before the 29th day of July, 1943, cash in the sum of Three Thousand Two Hundred Fifty Dollars ($3,250.00) to be held by the Clerk in escrow in the Registry of the Court until the determination of the appellant's appeal in the said cause, subject to further Order of this Court.

It Is Further Ordered, That in the event the said sentence is reversed, the said total sum (less costs, if any) shall be returned to the said Schenley Distillers Corporation upon Order of this Court.

It Is Further Ordered, That in the event the said sentence is affirmed, the said sum of Three Thousand Dollars ($3,000.00) shall be applied to the said judgment and in full payment of said fine, and so much of the said sum of Two hundred fifty dollars ($250.00) as shall be necessary to pay costs herein shall be applied to such costs, both in full payment of the judgment and sentence, and the balance thereof shall be paid to the said Schenley Distillers Corporation upon Order of this Court.

It Is Further Ordered, That the sum of Two hundred fifty dollars ($250.00) so deposited shall be security for the Appearance Bond of the said appellant filed herewith, and no surety shall be required on the said bond.

Done In Open Court, the day and year first above mentioned.

By the Court:

J. FOSTER SYMES, *Judge*.

Filed United States District Court, Denver, Colorado, July 29, 1943. G. Walter Bowman, Clerk.

Entered on the Docket July 29, 1943.

78 *Order Fixing Amount of Appearance Bond etc. as to Frankfort Distilleries, Inc.*

This matter coming on to be heard this twenty-eighth day of July, 1943, for the purpose of fixing the terms of the escrow deposit referred to herein and the amount of the Appearance Bond of the defendant, Frankfort Distilleries, Inc., hereinafter referred to as the appellant, the said appellant being represented before this court by Robert G. Bosworth, Winston S. Howard and Henry E. McElwain, Jr., its attorneys; and the court having assessed a fine against the said appellant upon its plea of nolo contendere in the sum of Three Thousand Dollars ($3,000.00);

It Is Hereby Ordered, That the Appearance Bond of the said appellant is fixed in the amount of Two Hundred Fifty Dollars ($250.00);

It Is Further Ordered, That the appellant deposit with the Clerk of this court, on or before the 4th day of August, 1943, cash in the sum of Three Thousand Two Hundred Fifty Dollars ($3,250.00) to be held by the Clerk in escrow in the Registry of the court until the determination of the appellant's appeal in the said cause, subject to further Order of this court.

It Is Further Ordered, That in the event the said sentence is reversed, the said total sum (less costs, if any) shall be returned to the said Frankfort Distilleries, Inc., upon Order of this court.

It Is Further Ordered, that in the event the said sentence is affirmed, the said sum of Three Thousand Dollars ($3,000.00) shall be applied to the said judgment and in full payment of said fine, and so much of the said sum of Two Hundred Fifty Dollars ($250.00) as shall be necessary to pay costs herein shall be applied to such costs, both in full payment of the judgment and sentence, and the balance thereof shall be paid to the said Frankfort Distilleries, Inc., upon Order of this court.

It Is Further Ordered, that the sum of Two Hundred Fifty Dollars ($250.00) so deposited shall be security
79 for the Appearance Bond of the said appellant filed herewith, and no surety shall be required on the said bond.

Done in open court the day and year first above mentioned.

By the Court:

J. FOSTER SYMES, *Judge.*

Filed United States District Court Denver, Colorado, July 28, 1943. G. Walter Bowman, Clerk.

Entered on the Docket July 28, 1943.

In United States District Court

Order Fixing Amount of Appearance Bont etc. as to McKesson & Robbins, Incorporated

This matter coming on to be heard this twenty-eighth day of July, 1943, for the purpose of fixing the terms of the escrow deposit referred to herein and the amount of the Appearance Bond of the defendant, McKesson & Robbins, Incorporated, hereinafter referred to as the appellant, the said appellant being represented before this court by W. W. Grant, its attorney; and the court having assessed a fine against the said appellant upon his plea of nolo contendere in the sum of Three Thousand Dollars ($3,000.00);

It Is Hereby Ordered, That the Appearance Bond of the said appellant is fixed in the amount of Two Hundred Fifty Dollars ($250.00);

It Is Further Ordered, That the appellant deposit with the Clerk of this court, on or before the 4th day of August, 1943, cash in the sum of Three Thousand Dollars ($3,000.00) to be held by the Clerk in escrow in the Registry of the court until the determination of the appellant's appeal in the said cause, subject to further Order of this court.

It Is Further Ordered, That in the event the said sentence is reversed, the said total sum (less costs, if any) shall be returned to the said McKesson & Robbins, Incorporated upon Order of this court.

It is Further Ordered, That in the event the said sen-
80 tence is affirmed, the said sum of Three Thousand Dollars ($3,000.00) shall be applied to the said judgment and in full payment of said fine, and so much of the said sum of Two Hundred Fifty Dollars ($250.00) as shall be necessary to pay costs herein shall be applied to such costs, both in full payment of the judgment and sentence, and the balance thereof shall be paid to the said McKesson & Robbins, Incorporated upon Order of this court.

It is Further Ordered, That the sum of Two Hundred Fifty Dollars ($250.00) so deposited shall be security for the Appearance Bond of the said appellant filed herewith, and no surety shall be required on the said bond.

Done in open court the day and year first above mentioned.

By the Court:

J. Foster Symes, *Judge.*

Filed United States District Court, Denver, Colorado, July 28, 1943. G. Walter Bowman, Clerk.

Entered on the Docket July 28, 1943.

619708—44——5

In United States District Court

Order Fixing Amount of Appearance Bond etc. as to National Distillers Products Corporation

This matter coming on to be heard this twenty-tighth day of July, 1943, for the purpose of fixing the terms of the escrow deposit referred to herein and the amount of the appearance bond of the defendant National Distillers Products Corporation, hereinafter referred to as the appellant, the said appellant being represented before this court by Messrs. Hodges, Vidal & Goree, Wm. V. Hodges, and Henry C. Vidal, Esqs. his attorneys; and the court having assessed a fine against the said appellant upon his plea of nolo contendere in the sum of Three Thousand Dollars ($3,000.00);

It is hereby ordered, that the appearance bond of the said appellant is fixed in the amount of Two Hundred Fifty Dollars ($250.00);

It is further ordered, that the appellant deposit with the Clerk of this Court, on or before the 4th day of August, 1943,
81 cash in the sum of Three Thousand Two Hundred Fifty Dollars ($3,250.00) to be held by the Clerk in escrow in the Registry of the court until the determination of the appellant's appeal in the said cause, subject to further order of this court.

It is further ordered, that in the event the said sentence is reversed, the said total sum (less costs, if any) shall be returned to the said National Distillers Products Corporation upon order of this court.

It is further ordered, that in the event the said sentence is affirmed, the said sum of three thousand dollars ($3,000.00) shall be applied to the said judgment and in full payment of said fine, and so much of the said sum of Two Hundred fifty dollars ($250.00) as shall be necessary to pay costs herein shall be applied to such costs, both in full payment of the judgment and sentence, and the balance thereof shall be paid to the said National Distillers Products Corporation upon order of this court.

It is further ordered, that the sum of Two Hundred Fifty Dollars ($250.00) so deposited shall be security for the appearance bond of the said appellant filed herewith, and no surety shall be required on the said bond.

Done in open court the day and year first above mentioned.

By the Court:

J. FOSTER SYMES, *Judge.*

Filed United States District Court, Denver, Colorado, July 28, 1943. G. Walter Bowman, Clerk.

Entered on the Docket July 28, 1943.

In United States District Court

Order Fixing Amount of Appearance Bond etc. as to Brown Forman Distillers Corporation

This matter coming on to be heard this twenty-eighth day of July 1943, for the purpose of fixing the terms of the escrow deposit referred to herein and the amount of the Appearance Bond of the defendant Brown Forman Distillers Corporation, hereinafter referred to as the appellant, the said appellant being represented before this court by Dines, Dines & Holme and Robert E.
82 More, his attorneys; and the court having assessed a fine against the said appellant upon his plea of nolo contendere in the sum of Twenty-five Hundred Dollars ($2,500.00);

It is Hereby Ordered, That the Appearance Bond of the said appellant is fixed in the amount of Two Hundred Fifty Dollars ($250.00);

It Is Further Ordered, That the appellant deposit with the Clerk of this Court, on or before the 4th day of August, 1943, cash be held by the Clerk in escrow in the Registry of the court until the determination of the appellant's appeal in the said cause, subject to further Order of this court.

It Is Further Ordered, That in the event the said sentence is reversed, the said tital sum (less costs, if any) shall be returned to the said Brown Forman Distillers Corporation upon Order of this court

It Is Further Ordered, That in the event the said sentence is affirmed, the said sum of Twenty-five Hundred Dollars ($2,500.00) shall be applied to the said judgment and in full payment of said fine, and so much of the said sum of Two Hundred Fifty Dollars ($250.00) as shall be necessary to pay costs herein shall be applied to such costs, both in full payment of the judgment and sentence, and the balance thereof shall be paid to the said Brown Forman Distillers Corporation upon Order of this court.

It Is Further Ordered, That the sum of Two Hundred Fifty Dollars ($250.00) so deposited shall be security for the Appearance Bond of the said appellant filed herewith, and no surety shall be required on the said bond.

Done in open court the day and year first above mentioned.

By the Court:

J. Foster Symes, *Judge.*

Filed United States District Court, Denver, Colorado, July 28, 1943. G. Walter Bowman, Clerk.

Entered on the Docket July 28, 1943.

83 In United States District Court

Order Fixing Amount of Appearance Bond etc. as to J. E. Speegle

This matter coming on to be heard this twenty-eighth day of July, 1943, for the purpose of fixing the terms of the escrow deposit referred to herein and the amount of the Appearance Bond of the defendant, J. E. Speegle, hereinafter referred to as the appellant, the said appellant being represented before this court by Morris Rifkin, his attorney; and the court having assessed a fine against the said appellant upon his plea of nolo contendere in the sum of Twenty-five hundred dollars ($2,500.00);

It Is Hereby Ordered, That the Appearance Bond of the said appellant is fixed in the amount of Two Hundred Fifty Dollars ($250.00);

It Is Further Ordered, That the appellant deposit with the Clerk of this court, on or before the 4th day of August, 1943, cash in the sum of Twenty-seven hundred fifty Dollars ($2,750.00) to be held by the Clerk in escrow in the Registry of the Court until the determination of the appellant's appeal in the said cause, subject to further Order of this court;

It is Further Ordered, That in the event the said sentence is reversed, the said total sum (less costs, if any) shall be returned to the said J. E. Speegle upon Order of this court.

It Is Further Ordered, That in the event the said sentence is affirmed, the said sum of Twenty-five hundred Dollars ($2,500.00) shall be applied to the said judgment and in full payment of said fine, and so much of the said sum of Two Hundred Fifty Dollars ($250.00) as shall be necessary to pay costs herein shall be applied to such costs, both in full payment of the judgment and sentence, and the balance thereof shall be paid to the said J. E. Speegle upon Order of this court.

It is Further Ordered, That the sum of Two Hundred Fifty Dollars ($250.00) so deposited shall be security for
84 the Appearance Bond of the said appellant filed herewith, and no surety shall be required on the said bond.

Done in open court the day and year first above mentioned.

By the court:

J. FOSTER SYMES, *Judge.*

Filed United States District Court, Denver, Colorado, July 28, 1943. G. Walter Bowman, Clerk.

Entered on the Docket July 28, 1943.

Statement re appearance bonds

[An approved appearance bond was filed by Hiram Walker, Incorporated, July 30, 1943. Approved appearance bonds were filed by Seagram Distiilers Corporation and Schenley Distillers Corporation on July 28, 1943. An approved appearance bond was filed by Frankfort Distilleries, Inc., on August 3, 1943. An approved appearance bond was filed by McKesson & Robbins, Incorporated, on July 28, 1943. An approved appearance bond was filed by National Distillers Products Corporation on August 4, 1943. Approved appearance bonds were filed by Brown Forman Distillers Corporation and J. E. Speegle on July 28, 1943. Each of the appearance bonds is in the sum of $250.00.]

In United States District Court

Order Extending Time for Filing Respective Assignments of Error

Aug. 16, 1943

At this day comes Thomas J. Morrissey, Esquire, District Attorney, and George B. Haddock, Esquire, Special Assistant to the Attorney General, who prosecutes the above-entitled case; and the defendants Seagram-Distillers Corporation and McKesson & Robbins, Inc., by their attorney, W. W. Grant, Esquire; Frankford Distilleries, Inc., by Robert G. Bosworth, Esquire, its attorney; Brown Forman Distillers Corporation, by Robert E. More, Esquire, its attorney; Schenley Distillers Corpora-
85 tion, by Ira C. Kothgerber, Esquire, its attorney; J. E. Speegle by Morris Rifkin, Esquire, his attorney; National Distillers Products Corporation, by W. V. Hodges, Esquire, its attorney; and Hiram Walker, Incorporated, by Ed Miller, Esquire, its attorney, also come.

And thereupon, it is ordered by the court that the appealing defendants have day and to and including the thirtieth day of September, A. D. 1943, within which to file their respective assignments of error herein.

Entered on the Docket August 26, 1943.

In United States District Court

Assignments of Error of Hiram Walker, Incorporated

Comes now Hiram Walker, Incorporated, one of the above named defendants, by its attorneys, Charles Rosenbaum and Edward Miller, and assigns as error:

I. The Order of the Court overruling the said defendant's Demurrer to Count Two of the Indictment for the reasons that:

(a) The said Count of the Indictment does not state facts constituting a crime committed by this defendant;

(b) The second Count of the Indictment does not charge an offense under the Sherman Act for the reason that the acts charged in the second Count of the Indictment related to a commodity which had ceased to be in interstate commerce and which was solely in intrastate commerce;

(c) The second Count of the Indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act;

(d) The second Count of the Indictment does not state facts sufficient to charge an offense under the Sherman Act committed by this defendant;

(e) The allegations of the second Count of the Indictment are so vague, ambiguous, indefinite and uncertain as to be in violation of the Sixth Amendment to the Constitution of the United States;

(f) The acts in the second Count of the Indictment
86 charged to the defendant were performed under the sanction of the laws of the State of Colorado;

(g) The sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and Laws of the United States.

The Order of Court overruling the said defendant's Motion to Quash Count Two of the Indictment for the reasons that:

(a) The said Count of the Indictment does not state facts constituting a crime committed by this defendant;

(b) The second Count of the Indictment does not charge an offense under the Sherman Act for the reason that the acts charged in the second Count of the Indictment related to a commodity which had ceased to be in interstate commerce and which was solely in intrastate commerce;

(c) The second Count of the Indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act;

(d) The second Count of the Indictment does not state facts sufficient to charge an offense under the Sherman Act committed by this defendant;

(e) The allegations of the second Count of the Indictment are so vague, ambiguous, indefinite and uncertain as to be in violation of the Sixth Amendment to the Constitution of the United States;

(f) The acts in the second Count of the Indictment charged to the defendant were performed under the sanction of the laws of the State of Colorado;

(g) The sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and Laws of the United States.

HIRAM WALKER, INCORPORATED,
By CHARLES ROSENBAUM,
EDWARD MILLER,
Its Attorneys, 930 University Building,
Denver, Colorado.

Filed United States District Court, Denver, Colorado, September 3, 1943. G. Walter Bowman, Clerk.

87 In United States District Court

Assignments of Error of Seagram-Distillers Corporation

Comes now Seagram-Distillers Corporation, one of the above-named defendants, by its attorneys, W. W. Grant and Morrison Shafroth, and assigns the following as error:

The Order of the Court overruling said defendant's demurrer and motion to quash, directed to Count Two of the Indictment, for the following reasons:

1. That Count Two of the Indictment does not state facts constituting a crime committed by this defendant.

2. That Count Two of the Indictment does not charge an offense under the Sherman Act for the reason that the acts charged in said Count relate to a commodity which had ceased to be in interstate commerce and was solely in intrastate commerce.

3. That Count Two of the Indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act.

4. Count Two of the Indictment is so vague, ambiguous, indefinite, and uncertain as to violate the Sixth Amendment to the Constitution of the United States.

5. The acts charged against the defendant in Count Two of the Indictment were done and performed under the sanction of the laws of the State of Colorado and the sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and laws of the United States.

6. Count Two of the Indictment does not state facts sufficient to constitute an offense under the Sherman Act insofar as this defendant is concerned.

7. The allegations of Count Two of the Indictment with respect to venue are vague, indefinite, uncertain and insufficient and do not operate to fix Colorado as the locus of any specific act charged during the period covered by the Indictment.

8. Count Two of the Indictment fails to inform the defendants sufficiently of the crime with which they are charged in ac-
88 cordance with the requirements of the Fifth Amendment to the Constitution of the United States.

Wherefore, appellant prays that the judgment of the District Court be reversed and held for naught.

SEAGRAM-DISTILLERS CORPORATION,
By W. W. GRANT,
MORRISON SHAFROTH,
Attorneys for Appellant,
730 Equitable Building, Denver, Colorado.

Filed United States District Court, Denver, Colorado, August 26, 1943. G. Walter Bowman, Clerk.

In United States District Court

Assignments of Error of Schenley Distillers Corporation

Comes now Schenley Distillers Corporation, one of the above-named defendants, by its attorneys, Robert S. Marx and Ira C. Rothgerber, and assigns as error:

I. The Order of the Court overruling the said defendant's Demurrer to Count Two of the Indictment for the reasons that:

(a) The said Count of the Indictment does not state facts constituting a crime committed by this defendant;

(b) The second Count of the Indictment does not charge an offense under the Sherman Act for the reason that the acts charged in the second Count of the Indictment related to a commodity which had ceased to be in interstate commerce and which was solely in intrastate commerce:

(c) The second Count of the Indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act;

(d) The second Count of the Indictment does not state facts sufficient to charge an offense under the Sherman Act committed by this defendant;

89 (e) The allegations of the second Count of the Indictment are so vague, ambiguous, indefinite and uncertain as to be in violation of the Sixth Amendment to the Constitution of the United States;

(f) The acts in the second Count of the Indictment charged to the defendant were performed under the sanction of the laws of the State of Colorado;

(g) The sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and Laws of the United States.

II. The Order of Court overruling the said defendant's Motion to Quash Count Two of the Indictment for the reasons that;

(a) The said Count of the Indictment does not state facts constituting a crime committed by this defendant;

(b) The second Count of the Indictment does not charge an offense under the Sherman Act for the reason that the acts charged in the second Count of the Indictment related to a commodity which had ceased to be in interstate commerce and which was solely in intrastate commerce;

(c) The second Count of the Indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act;

(d) The second Count of the Indictment does not state facts sufficient to charge an offense under the Sherman Act committed by this defendant;

(e) The allegations of the second Count of the Indictment are so vague, ambiguous, indefinite and uncertain as to be in violation of the Sixth Amendment to the Constitution of the United States;

(f) The acts in the second Count of the Indictment charged to the defendant were performed under the sanction of the laws of the State of Colorado;

90 (g) The sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and Laws of the United States.

SCHENLEY DISTILLERS CORPORATION,
By ROBERT S. MARX,
Cincinnati, Ohio.

IRA C. ROTHGERBER,
630 Symes Building, Denver, Colorado.

Filed United States District Court, Denver, Colorado, September 25, 1943. G. Walter Bowman, Clerk.

In United States District Court

Assignments of Error of Frankfort Distilleries, Incorporated

Comes Now, Frankfort Distilleries, Incorporated, one of the above named defendants, by its attorneys, Henry E. McElwin, Jr., Robert G. Bosworth and Winston S. Howard, and assigns as error:

The Order of court overruling said defendants' Demurrer and Motion to Quash directed to Count 2 of the Indictment for the following reasons:

1. That said Count 2 of the Indictment does not state facts constituting a crime committed by this defendant.

2. That said Count 2 of the Indictment does not charge an

offense under the Sherman Act for the reason that the acts charged in said Count relate to a commodity which had ceased to be interstate commerce and was solely in intrastate commerce.

3. That said Count 2 of the Indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act.

4. That said Count 2 of the Indictment charges the commission of acts by this defendant which were done and performed
91 under the sanction of the laws of the State of Colorado and the sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and Laws of the United States.

5. That said Count 2 of the Indictment is so vague, ambiguous, indefinite and uncertain as to violate the Sixth Amendment to the Constitution of the United States.

6. That said Count 2 of the Indictment does not state facts sufficient to constitute an offense under the Sherman Act insofar as this defendant is concerned.

FRANKFORT DISTILLERIES, INCORPORATED,
By HENRY E. McELWAIN, JR.,
Address: Kentucky Home Life Building,
Louisville, Kentucky,
ROBERT G. BOSWORTH,
WINSTON S. HOWARD,
Address: 520 Equitable Building, Denver, Colorado,
Its Attorneys.

Filed United States District Court, Denver, Colorado, September 21, 1943. G. Walter Bowman, Clerk.

In United States District Court

Assignments of Error of McKesson & Robbins, Incorporated

Comes now McKesson & Robbins, Incorporated, one of the above named defendants, by its attorneys, W. W. Grant and Morrison Shafroth, and assigns the following as error:

92 The Order of the Court overruling said defendant's demurrer and motion to quash, directed to Count Two of the Indictment, for the following reasons:

1. That Count Two of the Indictment does not state facts constituting a crime committed by this defendant.

2. That Count Two of the Indictment does not charge an offense under the Sherman Act for the reason that the acts charged in said Count relate to a commodity which had ceased to be in interstate commerce and was solely in intrastate commerce.

3. That Count Two of the Indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act.

4. Count Two of the Indictment is so vague, ambiguous, indefinite, and uncertain as to violate the Sixth Amendment to the Constitution of the United States.

5. The acts charged against the defendant in Count Two of the Indictment were done and performed under the sanction of the laws of the State of Colorado and the sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and laws of the United States.

6. Count Two of the Indictment does not state facts sufficient to constitute an offense under the Sherman Act insofar as this defendant is concerned.

7. The allegations of Count Two of the Indictment with respect to venue are vague, indefinite, uncertain and insufficient and do not operate to fix Colorado as the locus of any specific act charged during the period covered by the Indictment.

8. Count Two of the Indictment fails to inform the defendants sufficiently of the crime with which they are charged in accordwith the requirements of the Fifth Amendment to the Constitution of the United States.

93 Wherefore, appellant prays that the judgment of the District Court be reversed and held for naught.

McKesson & Robbins, Incorporated.
By W. W. Grant,
Morrison Shafroth,
Attorneys for Appellant,
730 Equitable Building, Denver, Colorado.

Filed United States District Court, Denver, Colorado, August 26, 1943. G. Walter Bowman, Clerk.

In United States District Court

Assignments of Error of National Distillers Products Corporation

Comes now National Distillers Products Corporation, one of the above named defendants, by its attorneys, and assigns the following as a specification of errors committed by the trial court in this proceeding:

The Court erred in overruling this defendant's demurrer and motion to quash directed to Count Two of the indictment, for the following reasons:

1. That neither Section 1 of the Sherman Act nor any other Act of Congress defines as a crime against the United States any

act or acts charged in the indictment to have been done or participated in by the defendant.

2. That Count Two of the indictment does not state facts constituting a crime committed by this defendant.

3. That Count Two of the indictment does no charge any offense under the Sherman Act for the reason that the acts charged in said count related to a commodity which had ceased to be in interstate commerce and was solely in intrastate commerce.

4. That Count Two of the indictment is fatally defective in that is does not charge an agreement among the defendants to accomplish any illegal act.

94 5. That Count Two of the indictment is so vague, ambiguous, indefinite and uncertain as to violate the Sixth Amendment to the Constitution of the United States.

6. The acts charged against the defendant in Count Two of the indictment were done and performed under the sanction of the laws of the State of Colorado, and the sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and laws of the United States.

NATIONAL DISTILLERS PRODUCTS CORPORATION,
By HODGES, VIDAL & GOREE,
WM. V. HODGES,
Its Attorneys,
947 Equitable Building, Denver, Colorado.

Filed: United States District Court, Denver, Colorado, Sept. 27, 1943. G. Walter Bowman, Clerk.

In United States District Court

Assignments of Error of Brown Forman Distillers Corporation

Comes now Brown Forman Distillers Corporation, one of the above named defendants, by its attorneys, Dines, Dines and Holme, and Robert E. More, and assigns as error:

I. The Order of the Court overruling the said defendant's Demurrer to Count Two of the Indictment, for the reasons that:

(a) The said Count of the Indictment does not state facts constituting a crime committed by this defendant;

(b) The second Count of the Indictment does not charge an offense under the Sherman Act for the reason that the acts charged in the second Count of the Indictment related to a commodity which had ceased to be in interstate commerce and which was solely in intrastate commerce;

(c) The second Count of the Indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act;

95 (d) The second Count of the Indictment does not state facts sufficient to charge an offense under the Sherman Act committed by this defendant;

(e) The allegations of the second Count of the Indictment are so vague, ambiguous, indefinite, and uncertain as to be in violation of the Sixth Amendment to the Constitution of the United States;

(f) The acts in the second Count of the Indictment charged to the defendant were performed under the sanction of the laws of the State of Colorado;

(g) The sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and laws of the United States.

II. The Order of Court overruling the said defendant's Motion to quash Count Two of the Indictment for the reasons that—

(a) The said Count of the Indictment does not state facts constituting a crime committed by this defendant;

(b) The second Count of the Indictment does not charge an offense under the Sherman Act for the reason that the acts charged in the second Count of the Indictment related to a commodity which had ceased to be in interstate commerce and which was solely in intrastate commerce;

(c) The second Count of the Indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act;

(d) The second Count of the Indictment does not state facts sufficient to charge an offense under the Sherman Act committed by this defendant;

(e) The allegations of the second Count of the Indictment are so vague, ambiguous, indefinite, and uncertain as to be in violation of the Sixth Amendment to the Constitution of the United States;

(f) The acts in the second Count of the Indictment charged to the defendant were performed under the sanction of the laws of the State of Colorado;

(g) The sole jurisdiction over such acts was vested in

96 the State of Colorado by the Constitution and Laws of the United States.

BROWN FORMAN DISTILLERS CORPORATION.
By DINES, DINES & HOLME.
ROBERT E. MORE.
Its Attorneys.
1210 First National Bank Bldg., Denver 2, Colorado.

Filed; United States District Court, Denver, Colorado, Sep. 22, 1943. G. Walter Bowman, Clerk.

In United States District Court

Assignments of Error of J. E. Speegle

Comes now J. E. Speegle, one of the above-named defendants, by his attorneys, W. W. Grant and Morris Rifkin, and assigns the following as error:

The Order of the Court overruling said defendant's demurrer and motion to quash directed to Count Two of the Indictment, for the following reasons:

1. That Count Two of the Indictment does not state facts constituting a crime committed by this defendant.

2. That Count Two of the Indictment does not charge an offense under the Sherman Act for the reason that the acts charged in said Count relate to a commodity which had ceased to be in interstate commerce and was solely in intrastate commerce.

3. That Count Two of the Indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act.

4. Count Two of the Indictment is so vague, ambiguous, indefinite, and uncertain as to violate the Sixth Amendment to the Constitution of the United States.

5. The acts charged against the defendant in Count Two of the Indictments were done and performed under the sanction of the laws of the State of Colorado, and the sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and laws of the United States.

97 6. Count Two of the Indictment does not state facts sufficient to constitute an offense under the Sherman Act insofar as this defendant is concerned.

7. The allegations of Count Two of the Indictment with respect to venue are vague, indefinite, uncertain, and insufficient and do not operate to fix Colorado as the locus of any specific act charged during the period covered by the Indictment.

8. Count Two of the Indictment fails to inform the defendants sufficiently of the crime with which they are charged in accordance with the requirement of the Fifth Amendment to the Constitution of the United States.

Wherefore, appellant prays that the judgment of the District Court be reversed and held for naught.

J. E. SPEEGLE,
By W. W. GRANT,
Attorney for Appellant,
730 Equitable Building, Denver, Colorado.
MORRIS RIFKIN,
Attorney for Appellant,
Symes Building, Denver, Colorado.

Filed: United States District Court, Denver, Colorado, Aug. 26, 1943. G. Walter Bowman, Clerk.

In United States District Court

Stipulation As to Transcript of Record

Whereas, the following defendants were indicted jointly in the above-entitled action, and judgment and sentence was entered against each on July 28, 1943, namely: J. E. Speegle, McKesson & Robbins, Incorporated, Hiram Walker, Incorporated, Seagram-Distillers Corporation, Schenley Distillers Corporation, National Distillers Products Corporation, Brown Forman Distillers Corporation, and Frankfort Distillers, Inc.; and

Whereas each of said defendants has filed a separate ap-
98 peal and said appeals have been docketed separately upon the records of the United States Circuit Court of Appeals for the Tenth Circuit;

Now, therefore, in view of the premises, it is stipulated and agreed by and between each of the above-named defendants-appellants, by their counsel, and the United States of America, appellee, by Thomas J. Morrissey, Esq., United States District Attorney for the District of Colorado, and George B. Haddock, Esq., Special Assistant to the Attorney General, as follows:

1. That the appeals of all of the above-named defendants-appellants may be presented to the United States Circuit Court of Appeals for the Tenth Circuit upon one transcript of record.

2. That the said transcript of record shall include the following:

(a) The indictment.

(b) The several motions to quash, filed on behalf of each of said defendants-appellants.

(c) The Court's rulings thereon.

(d) The demurrer filed on behalf of each of said defendants-appellants.

(e) The Court's rulings thereon.

(f) The memorandum opinion of the Court overruling the motions to quash and demurrers aforesaid.

(g) The order of the Court requiring the government to elect between the two counts of the indictment.

(h) The election of the government.

(i) The order of the Court quashing Count 1 of the indictment.

(j) The separate pleas of each of the above defendants-appellants and the judgment against and sentence as to each one.

(k) The notice of appeal of each of said defendants-appellants, and order approving appearance bond.

It is further stipulated and agreed that each of said
99 defendants-appellants shall file its separate assignments of error by September 30, 1943, the time having been fixed by order of Court of August 16, 1943.

J. E. Speegle, by Morris Rifkin; McKesson & Robbins, Incorporated, by W. W. Grant, by Morris on Shaffroth; Brown Forman Distillers Corporation, by Dines, Dines & Holme, by Robert E. More; Frankfort Distillers, Incorporated, by Robert G. Bosworth, by Winston H. Howard; Hiram Walker, Incorporated, by Charles Rosenbaum, by Edward Miller; National Distillers Products Corporation, by Hodges, Vidal & Goree, by Wm. V. Hodges; Schenley Distillers Corporation, by Ira C. Rothgerber; Seagram-Distillers Corporation, by W. W. Grant, by Morrison Shaffroth; United States of America, by Thomas J. Morrissey, United States District Attorney for the District of Colorado; Geo. B. Haddock, Special Assistant to the United States Attorney General.

Filed United States District Court, Denver, Colorado, August 26, 1943—G. Walter Bowman, Clerk.

In United States District Court

Order Approving Stipulation as to Record on Appeal

Aug. 26, 1943

100 At this day come the defendants, J. E. Speegle, McKesson & Robbins, Incorporated; Hiram Walker, Incorporated; Seagram Distillers Corporation; Schenley Distillers Corporation; National Distillers Products Corporation; Brown Forman Distillers Corporation and Frankfort Distillers, Inc., by W. W. Grant, Esquire, their attorney, and present to the Court now here the Stipulation as to Transcript of Record, entered into between the said defendants and The United States of America. And thereupon, upon consideration thereof:

It is ordered by the Court that the said stipulation of the appealing defendants as to the transcript of record, be, and it is hereby approved.

Entered on the docket August 26, 1943.

[Clerk's certificate to foregoing transcript omitted in printing.]

And thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Tenth Circuit:

Order of Submission, Jan. 18, 1944

Second Day, January Term, Tuesday, January 18th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, and Honorable Alfred P. Murrah, Circuit Judges.

These causes came on to be heard, W. W. Grant, Esquire, appearing for appellants in cases Numbers 2797, 2798, and 2799; Robert S. Marx, Esquire, appearing for appellant in case No. 2796; William V. Hodges, Esquire, appearing for appellant in case No. 2793; Charles Rosenbaum, Esquire, appearing for appellants in cases Numbers 2794 and 2795; George B. Haddock, Esquire, appearing for United States of America.

On motion, Schenley Distillers Corporation, appellant in case No. 2796, was granted leave to file four typewritten copies of a reply brief instanter, which was accordingly done.

Thereupon these causes were argued by counsel and were submitted to the court.

Judgment, Case No. 2792, Feb. 28, 1944

Twentieth Day, January Term, Monday, February 28th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the indictment as to appellant.

Judgment, Case No. 2793, Feb. 28, 1944

Twentieth Day, January Term, Monday, February 28th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district

court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the indictment as to appellant.

Judgment, Case No. 2794, Feb. 28, 1944

Twentieth Day, January Term, Monday, February 28th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the indictment as to appellant.

Judgment, Case No. 2795, Feb. 28, 1944

Twentieth Day, January Term, Monday, February 28th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the indictment as to appellant.

Judgment, Case No. 2796, Feb. 28, 1944

Twentieth Day, January Term, Monday, February 28th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district

court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the indictment as to appellant.

Judgment, Case No. 2797, Feb. 28, 1944

Twentieth Day, January Term, Monday, February 28th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, and Honorable Alfred P. Murrah, Circuit Judges.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the indictment as to appellant.

Judgment, Case No. 2798, Feb. 28, 1944

Twentieth Day, January Term, Monday, February 28th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the indictment as to appellant.

Judgment, Case No. 2799, Feb. 28, 1944

Twentieth Day, January Term, Monday, February 28th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the indictment as to appellant.

On March 10, 1944, the mandate of the United States Circuit Court of Appeals in each case, in accordance with the opinion and judgments of said court, was issued to the United States District Court.

Pursuant to the order of the United States Circuit Court of Appeals the mandates issued March 10, 1944, were recalled.

Order Vacating Judgment of February 28, 1944, etc., Case No. 2792

Thirty-sixth Day, January Term, Saturday, March 25th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the court's own motion to vacate the judgment entered herein on February 28, 1944.

It is now here ordered by the court that the judgment entered herein on February 28, 1944, be and the same is hereby vacated, set aside and held for naught.

It is further ordered by the court that this cause be set for reargument limited to the question of whether the second count of the indictment charges the offenses set out with sufficient particularity.

[Orders identical with that entered in case No. 2792, vacating the judgments entered February 28, 1944, in cases Nos. 2793 to 2799, inclusive, were entered March 25, 1944.]

Order of Submission, April 24, 1944

First Day, Special April Term, Monday, April 24th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, Honorable Walter A. Huxman, and Honorable Alfred P. Murrah, Circuit Judges.

These causes came on to be heard, Holmes Baldridge, Esquire, and George B. Haddock, Esquire, appearing for United States of America; Henry N. Ess, Esquire, appearing for Safeway Stores, Incorporated (Maryland), et al.; Robert S. Marx, Esquire, and T. M. Lillard, Esquire, appearing for The Kroger Grocery & Baking Company et al.; W. W. Grant, Esquire, appearing for Frankfort Distilleries, Inc., et al.

Thereupon argument was commenced by counsel and continued to the hour of adjournment.

Order of Submission, April 25, 1944

Second Day, Special April Term, Tuesday, April 25th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, Honorable Walter A. Huxman, and Honorable Alfred P. Murrah, Circuit Judges.

These causes came on further to be heard, Holmes Baldridge, Esquire, and George B. Haddock, Esquire, appearing for United States of America; Henry N. Ess, Esquire, appearing for Safeway Stores, Incorporated (Maryland), et al.; Robert S. Marx, Esquire, and T. M. Lillard, Esquire, appearing for The Kroger Grocery & Baking Company et al.; W. W. Grant, Esquire, appearing for Frankfort Distilleries, Inc., et al.

Thereupon argument by counsel was concluded and the causes were submitted to the court.

Opinion August 26, 1944

Before Phillips, Bratton, Huxman, and Murrah, Circuit Judges

BRATTON, *Circuit Judge:*

These are three criminal prosecutions for combining and conspiring, in some courts to restrain interstate trade and commerce, and in others to monopolize such trade and commerce, in violation of the Sherman Act, as amended, 26 Stat. 209, 50 Stat. 693, 15 U. S. C. A. §§ 1, 2. The cases were submitted on rehearing to the full court. The opinions previously announced, for the unanimous court in one instance and for the majority in the other, are withdrawn and the following is substituted in lieu of them.

The indictment in Numbers 2792 to 2799, inclusive, containing two counts, was returned in the United States Court for Colorado against twenty-nine corporations and fifty-four individuals. Nineteen of the corporations are engaged in the production of alcoholic beverages outside of Colorado; eight are wholesalers engaged in the business in Colorado of purchasing alcoholic beverages for resale to retailers; one is a wholesale association, the members of which are wholesalers doing business in the state, hereinafter referred to as Wholesale Association; and one is a retail association, the members of which are retailers engaged in business in the state, hereinafter called Package Association. Some of the individuals are or were officers or employees of the defendant producers; some are or were officers or employees of the defendant wholesalers; and some are engaged in the sale and distribution at retail of alcoholic beverages in Colorado. The first count was dismissed.

The second count charges a conspiracy to raise, fix, and maintain the retail prices of alcoholic beverages shipped into Colorado. It defines certain terms and delineates the facts with respect to the several defendants as to being producer, wholesaler, retailer, officer, or employee, respectively. It contains a description of the nature of the trade and commerce involved. Under this head, it sets out that alcoholic beverages are marketed in Colorado by means of a continuous flow of shipments from producers located outside the state through wholesalers and retailers to the consuming public; that beverages shipped and sold in bottles by producers can be sold to retailers there only by wholesalers licensed under the laws of that state; that wholesalers and retailers are conduits through which beverages are shipped into the state and sold and distributed to the consuming public; that more than ninety-eight per cent of the spirituous liquor, more than eighty per cent of the wine, and substantial amounts of beer, consumed in Colorado are produced elsewhere and shipped into the state for sale and distribution; that alcoholic beverages are distributed to more than 700 retailers in the state by approximately twenty-eight wholesalers; that more than seventy-five per cent of the spirituous liquor and wine, and substantial quantities of beer, are sold and distributed by the defendant wholesalers; and that all of the liquor and wine, and substantial quantities of beer, sold and distributed by the bottle or case to the consuming public, are sold by retailers, including the defendant retailers and other members of the defendant Package Association. It is then charged that beginning about January, 1936, and continuing to the time of the presentation of the indictment, the defendants combined and conspired to raise, fix, and maintain the retail prices of alcoholic beverages shipped into Colorado from producers located outside the state, by raising, fixing, and stabilizing retail mark-ups and margins of profit; that it was a part of the combination and conspiracy that the defendants from time to time discuss, agree upon, and adopt high, arbitary, and non-competitive retail prices, markups, and margins of profit; that the defendants Wholesale Association and Package Association, wholesalers, and retailers agree upon and undertake to persuade, induce, and compel producers, including the defendant producers, and wholesalers, to enter into fair trade contracts affecting every type and brand of alcoholic beverage shipped into Colorado and to establish in and by such contracts high, arbitrary, and artificial, retail prices embodying the high, arbitrary, and non-competitive margins of profit agreed upon; that the defendant Package Association prepare and adopt forms of fair trade contracts acceptable to the defendant retailers and to the other members of the association; that the defendant Pack-

age Association agree with producers and wholesalers on the forms of fair trade contracts to be used by such producers and wholesalers, and prepare and circulate among its members bulletins and notices announcing the adoption of fair trade contracts and giving the names of producers and wholesalers entering into them and also the names of those not doing so; that the defendant retailers, through the defendant Package Association, agree to and do patronize only those producers and wholesalers who enter into fair trade contracts embodying such retail prices, mark-ups, and margins of profit, and who require and compel observance of the minimum retail prices established in that manner, agree to and do withhold their patronage from producers and wholesalers who fail or refuse to enter into such fair trade contracts, and agree from time to time with producers and wholesalers respecting revisions in the retail prices established in and by such fair trade contracts so as to preserve and maintain the retail mark-ups and margins of profit. It is further charged that the defendants, acting in part through the defendants Wholesale Association and Package Association, agree to and do police the high, arbitrary, and non-competitive retail prices, mark-ups, and margins of profit, and require and secure observance of them; that they agree to and do employ paid executives and investigators to spy upon and embarrass retailers who fail or refuse to observe such retail prices, mark-ups and margins of profit, and threaten to and do institute and cause to be instituted legal proceedings against such retailers who fail or refuse to observe such prices, mark-ups, and margins of profit. It is also charged that the defendant retailers agree among themselves and with the defendant producers and the defendant wholesalers that retailers selling at prices lower than those established in the fair trade contracts be deprived of the opportunity to purchase beverages from the defendant producers and the defendant wholesalers; that the defendant retailers threaten to and do boycott producers and wholesalers who supply their products to retailers failing or refusing to observe the retail prices, mark-ups, and margins of profit; that in order to reduce price competition among retailers, defendant retailers, acting in part through defendant Package Association, agree and attempt to persuade and induce the authorized officials of Colorado, and of the City and County of Denver, to reject applications for retail liquor licenses; and that for the purpose of financing such activities, defendants agree upon and provide for the collection of an extra charge added to the wholesale price, the proceeds to be paid to the Wholesale Association and that it then pay a portion of such proceeds to the Package Association. And it is charged that the effect of the combination and conspiracy has been to raise, fix, sta-

bilize, and maintain the retail prices of alcoholic beverages shipped in interstate commerce into Colorado and sold and distributed in that state at levels acceptable to the defendants, to eliminate price competition among the defendant retailers, to eliminate price competition among the members of the Package Association, and to restrain and suppress interstate trade and commerce in alcoholic beverages not covered by fair trade contracts.

After their demurrers and motions to quash the indictment had been denied, the defendants Frankfort Distilleries, Inc., National Distillers Products Corporation, Brown Forman Distillers Corporation, Hiram Walker, Incorporated, Schenley Distillers Corporation, Seagram-Distillers Corporation, McKesson & Robbins, Incorporated, and J. E. Speegle each entered a plea of nolo contendre and prayed that the court impose sentence in all things as though a plea of guilty had been interposed. Fines were imposed, and separate appeals were perfected.

The indictment in Number 2807, containing two counts was returned in the United States Court for Kansas against Safeway Stores, Inc., incorporated in Maryland, Safeway Stores, Inc., incorporated in California, Safeway Stores, Inc., incorporated in Nevada, Safeway Stores, Inc., incorporated in Texas, Arizona Grocery Company, Sanitary Grocery Company, Dwight Edwards Company, The Lucerne Cream and Butter Company, Sutter Packing Company, and certain individuals being officers of such corporations, respectively.

The first count sets out that the defendant Safeway Stores, Inc., incorporated in Maryland, is a holding company and owns and controls all of the authorized and issued stock of the other corporate defendants, the time and manner of the acquisition being detailed; that in 1926 the Safeway group owned and operated in the United States 673 food stores, of which 120 were equipped with meat markets, and had sales of $50,536,514; that in 1932, the group owned and operated in the United States and Canada 3411 stores in which were located 2066 markets, and its sales amounted to $229,173,468; that in 1939, it owned and operated in the United States and Canada 2967 stores in which 2643 markets were located, and its sales were $385,882,083; that at the end of 1941, it owned and operated in the United States about 2850 stores of which about 2500 had markets; that its sales for that year totaled $423,787,700.21; that it had fifty-two principal warehouses, nineteen bakeries, seven creameries, and seven coffee roasting plants; that the wholesale warehouses and retail stores were divided into fourteen geographical divisions and the divisions subdivided into fifty-eight districts, the names of the divisions and districts, the number of warehouses, groceries, and bakeries in each being stated in detail; that the members of the group together

constitute the second largest manufacturers, processors, wholesalers, and retail distributors of food and food products in the United States; and that in addition to manufacturing, processing, canning, and packing food and food products for sale in its retail stores, the group obtains fresh fruits and vegetables from jobbers in various markets where they are located and ships them in interstate commerce to its warehouses which in turn distribute them to its retail stores for sale to consumers. It is further set out that by virtue of the horizontal and vertical integration of the functions and business of the group, and the centralization of the control thereof, the defendants have exercised the power to dominate and control the production, prices, and distribution of a substantial part of the food and food products produced, marketed, sold, and consumed in the United States.

It is then charged that for many years prior to the return of the indictment, and continuously up to its presentment, the defendants and others to the grand jury unknown entered into a combination and conspiracy to restrain interstate trade and commerce in food and food products, produced, distributed, and sold in many states. It is further charged that such combination and conspiracy consists of a continuing agreement and concert of action in acquiring by merger and otherwise the business of independent retail grocers and local chains; selecting local areas in which defendants use their dominant advantage to injure and destroy the competition of independent grocers, meat dealers, and small local food stores, by selling at retail in those areas sufficiently lower than elsewhere until control or the desired percentage of total retail business is obtained, using income from other areas and from operations other than retail to offset the losses or reductions in profits incident to such price cutting; combining with other national food chains operating in such selected areas to fix, maintain, and follow the prices established by the defendants; systematically preventing competition in selected trade areas, by combining with independent grocers and local and national food chains operating in such selected areas to fix retail prices and terms of sale of food, and by combining with manufacturers of food and food products and others to fix and maintain the resale prices and policies in such selected areas and to aid and assist such manufacturers and others in enforcing the prices fixed and established; obtaining and maintaining for themselves a systematic discriminatory buying preference over competitors by coercing suppliers to sell to other wholesalers and retailers on terms and conditions dictated by defendants, coercing suppliers—through threats of withdrawal of their patronage and otherwise—secretly to maintain two price structures on their products, the lower of which would be charged to defendants and the higher to their competitors, requiring sup-

pliers to give defendants secret preferential discounts and secret protection against price increases and declines, coercing suppliers to discontinue selling direct to their competitors while secretly continuing to sell direct to defendants at lower prices, inducing suppliers to divert a large portion of their plants and facilities to filling orders of defendants and then threatening to withdraw their patronage unless secretly given lower prices and large discounts, bidding in fresh fruits and produce at public auction on the secret understanding with the owner that settlement would be made at a lower price than that bid, coercing suppliers to grant preferential rebates by various pretexts unrelated to any actual saving or service to the supplier; systematically exacting from suppliers arbitrarily fixed rebates called "advertising" and "promotional" allowances for pretended services, demanding discounts and allowances for so-called "floor space rentals," "Store Sales Service," "feature payments," "label and container allowances," "Sign space rentals," and "mass displays" for mere pretended service; and fostering false comparisons of their prices with the prices charged by competitors and false reports calculated to conceal their activities and perpetuate their dominance and control of the distribution of food and food products; inspiring and publishing statements calculated and intended to foster such false comparisons, organizing, financing, and preparing publicity and propaganda for false front farmer, consumer, and housewife organizations and using the statements of such organizations in support of such false comparisons, and the systematic practice of secretly enhancing their actual prices above the advertised prices through short-changing, short-weighing, and marking up prices on store tags and purchases. And it is charged that the effect of such combination and conspiracy has been unreasonably to restrain a large part of the interstate trade and commerce in food and food products.

With minor exceptions which do not have any material bearing here, the second count charges the same facts as a conspiracy to monopolize trade and commerce, injure food manufacturers, processors, canners, wholesalers, and retail dealers, depress prices paid growers of fruits, vegetables, and other farm products, vest in defendants dominance and control of the distribution of food and food products in many of the largest trade areas in the United States, and make it impossible for any one not similarly integrated to enter or remain in competition with defendants.

The trial court sustained in part a demurer to the indictment, treated the infirmities as fatal, and dismissed the indictment as to the demurring defendants. The United States appealed.

The indictment in Number 2808, containing two counts, was also returned in the United States Court for Kansas. It was against

The Kroger Grocery & Baking Company, Wesco Foods Company, The Colter Company, Pay'n Takit, Inc., and certain individuals being officers of the corporations, respectively. It sets out that The Kroger Grocery & Baking Company owns the stock in the other corporate defendants, and in addition has acquired through merger and otherwise the business of forty-nine independent and local chains, the names, locations, dates of acquisition, and number of stores aggregating 2317, being detailed; and that the members of the group together constitute the third largest manufacturers, processors, wholesalers, and retail distributors of food and food products in the United States. It further sets forth the number and location of the processing plants and stores operated, and the location and volume of business transacted. The first count charges a conspiracy to restrain interstate trade and commerce in food and food products, produced, distributed, and sold in many states, and the second count charges a like conspiracy to monopolize such trade and commerce. The indictments in the two cases in Kansas are substantially alike in their material features.

In this case, the trial court similarly sustained in part a demurrer to the indictment, regarded the defects as fatal, and dismissed the indictment as to the demurring defendants. From the order of dismissal, the United States appealed.

One ground of demurrer in each case, denied by the court in Colorado, and sustained by the court in Kansas, was that the indictment was bad for vagueness, indefiniteness, and uncertainty. It is too well settled for doubt that an indictment is not objectionably vague, indefinite, and uncertain if it charges all of the essential elements of the offense with sufficient fullness, clarity, and particularity to advise the accused of the nature of the accusation against him, to enable him to prepare his defense, and to enable him to plead the judgment and record of acquittal or conviction in bar to a subsequent prosecution for the same offense. *Evans* v. *United States*, 153 U. S. 584; *Cochran and Sayre* v. *United States*, 157 U. S. 286; *Rosen* v. *United States*, 161 U. S. 29; *Bartell* v. *United States*, 227 U. S. 427; *United States* v. *Behrman*, 258 U. S. 280; *Wong Tai* v. *United States*, 273 U. S. 77; *Hagner* v. *United States*, 285 U. S. 427; *Weber* v. *United States*, 80 F. (2d) 687; *Crapo* v. *United States*, 100 F. (2d) 996; *Graham* v. *United States*, 120 F. (2d) 543; *Rose* v. *United States*, 128 F. (2d) 622; *United States* v. *Armour & Co.*, 137 F. (2d) 269.

Ordinarily it is not sufficient to charge the offense in the words of the statute creating the offense, unless such words themselves fully, directly, and expressly, without uncertainty or ambiguity, set forth all the essential elements necessary to constitute the crime intended to be punished. *United States* v. *Carll*, 105 U. S. 611; *United States* v. *Britton*, 107 U. S. 655. Where the statute is

general in terms and fails fully, directly, and expressly to set forth with certainty and without ambiguity all of the essential elements necessary to constitute offense, the indictment must descend to particulars and charge every constituent ingredient of which the crime is composed. *United States* v. *Cruikshank et al.*, 92 U. S. 542; *United States* v. *Hess*, 124 U. S. 483; *Evans* v. *United States*, *supra*; *Moore* v. *United States*, 160 U. S. 268; *Manley* v. *Georgia*, 279 U. S. 1.

The Sherman Act is couched in general language, it speaks in generic terms, and it fails to enter into details. It "has the degree of generality and adaptability comparable to that found to be desirable in constitutional provisions." *Appalachian Coals, Inc.*, v. *United States*, 288 U. S. 344. It therefore is necessary that an indictment charging an offense under its provisions descend to particulars and allege the constituent ingredients of which the crime is composed. *United States* v. *Armour & Co.*, *supra*. But these indictments charge in the language of the Act that the defendants formed and entered into the combination and conspiracy; and, obedient to the necessity of doing so, they descend to particulars and undertake to charge the essential elements of which the offense is composed. In short; the agreement to restrict or monopolize interstate commerce, as the case may be, is alleged in conformity with the Act, and the plans of the conspirators are set out in detail.

An indictment must be considered as a whole in determining whether it charges all of the essential elements of the offense sufficiently to inform the accused of the nature of the accusation, to enable him to prepare his defense, and to enable him to plead the judgment and record of acquittal or conviction in bar to a later prosecution for the same offense. All pertinent parts of it must be brought into view and considered in their totality. *United States* v. *Armour & Co.*, *supra*.

In respect of time, the indictment in the case in Colorado charges in general terms that each of the allegations contained therein shall be deemed to refer to the period beginning on or about January, 1936, the exact date being unknown to the grand jurors, and continuing thereafter up to and including the date of the presentation of the indictment. And it contains a specific charge that beginning on or about January, 1936, the exact date being unknown to the grand jurors, and continuously thereafter up to and including the date of the presentation of the indictment, the defendants entered into and engaged in the combination and conspiracy. The indictments in the cases in Kansas, in each count, after describing the defendants and the nature and extent of the business, charge that for many years prior to the return of the indictment, and continuously up to and including the day of the

presentation of the indictment, the defendants, and others to the grand jurors unknown, formed and carried out the combination and conspiracy. The gist of the offense under the Sherman Act is the agreement or confederation to restrain or monopolize interstate commerce, as the case may be. *Nash* v. *United States*, 229 U. S. 373; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 252. It is not exclusively a thing or entity of the very instant the minds of the parties come to a complete understanding, and no more. The purpose of the agreement is an essential element, and in its very essence it may contemplate that the operation shall extend over a period of time. If so, while the agreement continues, and while the parties are engaged in the operation of the design, they continue to transgress the statute. *United States* v. *Kissel*, 218 U. S. 601; *United States* v. *New York Great Atlantic & Pacific Tea Co.*, 137 F. (2d) 459, certiorari denied, 320 U. S. 783. These indictments each charge a continuing conspiracy. One fixes the beginning by a specific date; the other two fix it as many years prior to the presentation of the indictment; and all charge that it continued down to and including the date of the presentation of the indictment. That was sufficient in respect of time. *United States* v. *Kissel*, *supra*; *United States* v. *American Medical Association*, 110 F. (2d) 703, certorari denied, 308 U. S. 599, 310 U. S. 644.

In respect of the place at which the combination or conspiracy was formed, the indictment in the case in Colorado charges that it was entered into and carried out in part in the District of Colorado, and that during the period of the conspiracy and within three years next preceding the presentation of the indictment, the defendants performed within such district many of the acts and things set forth in the indictment; and in each case in Kansas, the indictment charges that the combination and conspiracy was entered into and carried out in part in the District of Kansas, and within the First Division thereof, that a named defendant (Safeway Stores, Inc., a Nevada corporation, in one instance, and The Kroger Grocery & Baking Company, in the other) has retail food stores, offices, and agents, and transacts business there, and that during the period of the combination and conspiracy, and within three years next preceding the presentation of the indictment, the defendants performed within such district and division many of the acts set forth in the indictment. More often than otherwise, a combination or conspiracy of the kind charged in these indictments is not formed or entered into by formal contract or other writing. It sometimes is not entered into wholly and completely at one time or place. It may be, and frequently is, pieced together and effected by contracts, conferences, verbal understandings, and arrangements, had and entered into at different times and places.

The allegation that the conspiracy was entered into and carried out in part within the district in which the indictment was returned was sufficient in respect of place, as against an attack by motion or demurrer on the ground of complete infirmity of the indictment.

The indictment in the case in Colorado charges that the defendants conspired to raise, fix, and maintain the retail prices of alcoholic beverages shipped into the state, without specifying or describing the particular kind or kinds of beverages. It also charges that it was a part of the combination and conspiracy to persuade, induce, and compel producers and wholesalers to enter into fair trade contracts, without giving the names of such producers and wholesalers; and that the defendants employ paid executives and investigators to spy upon and harass retailers who fail or refuse to observe the retail prices, mark-ups, and margins of profit agreed upon, without naming the executives, investigators, or retailers. And it contains other charges comparable in point of generality. The indictment in each case in Kansas charges in the first count that the defendants conspired to restrain interstate trade and commerce in food and food products, and in the second count to monopolize such trade and commerce, without specifying or describing the kind or kinds of food and food products. They further charge that it was a part of the combination and conspiracy that the defendants acquire by merger and otherwise the business of independent retail grocers and local chains throughout the United States, without naming or giving the location of the grocers and chains; and that they select local areas throughout the United States in which they use their dominant advantage to injure and destroy competition of independent grocers, meat dealers, and small local food chains, without specifying the areas or naming the grocers, meat dealers, or food chains. And they contain other comparable charges not necessary to detail, with similar omissions. But these indictments each charge in general terms a conspiracy to restrain interstate trade and commerce, or to monopolize such trade and commerce, as the case may be, substantially in the language of the Act. And if the allegations in respect to the manner and means of effecting the object of the combination and conspiracy are not set forth in sufficient detail, the remedy is to apply for a bill of particulars. *Glasser* v. *United States*, 315 U. S. 60.

Little need be said concerning the sufficiency of the indictments in respect to changing venue. In cases of this kind, jurisdiction is in the court of the district where the conspiracy was formed, or where some act pursuant to it took place. As already pointed out, the indictment in the case in Colorado charges that the combination and conspiracy was entered into and carried out in part

within the district, and that the defendants performed there many of the acts and things set forth in the indictment. And the indictment in each case in Kansas contains like charges. These allegations—admitted by the demurrers—were enough to lay venue. *Hyde* v. *United States*, 225 U. S. 347; *Brown* v. *Elliott*, 225 U. S. 392; *United States* v. *Trenton Potteries*, 273 U. S. 392; *United States* v. *Socony-Vacuum Oil Co.*, *supra*; *United States* v. *New York Great Atlantic & Pacific Tea Co.*, *supra*.

An additional ground of demurrer sustained in the cases in Kansas was that each count in the indictment was duplicitous, in that it attempted to charge more than one offense. The several counts each charge only a single crime—the conspiracy. The conspiracy as laid includes several acts and means of making it effective, but the crime is the entering into the combination. That is the unit, however varied the means and procedure of effectuating it. The several acts and means of making the conspiracy effective are related acts which enter into the crime, but still the single crime is that of combining and conspiring together to restrain interstate trade and commerce, or to monopolize such trade and commerce. Duplicity in an indictment means the charging of two or more separate and distinct offenses in one count, not the charging of a single offense into which several related acts enter as ways and means of accomplishing the purpose. *Braverman* v. *United States*, 317 U. S. 49; *United States* v. *New York Great Atlantic & Pacific Tea Co.*, *supra*.

Two additional questions remain for consideration concerning the indictment in the case in Colorado which are not present in the cases in Kansas. They are whether the Sherman Act longer applies to interstate commerce in intoxicating liquor, and whether the indictment charges a combination and conspiracy to restrict interstate trade and commerce or merely affects intrastate activities. The Twenty-first Amendment does not strip the national government of all authority to legislate in respect of interstate commerce in intoxicating liquor. *Hayes* v. *United States*, 112 F. (2d) 417; *Washington Brewers Institute* v. *United States*, 137 F. (2d) 964. But it does sanction the right of a state to legislate concerning the importation of such liquor from other states unfettered by the Commerce Clause. *Ziffrin, Inc.*, v. *Reeves*, 308 U. S. 132; *Cf. Carter* v. *Virginia*, 321 U. S. 131. Aside from the diminution pro tanto which may be found in the Twenty-first Amendment in respect of the transportation of intoxicating liquor, a question unnecessary to determine here, Congress has plenary power under the Commerce Clause to regulate commerce among the states. And that power is not confined in all cases to the regulation of interstate commerce. It extends in sweep to intrastate activities which affect interstate trade, or the exercise of the power of Congress over

it, in such manner as to make the regulation of such intrastate activities unnecessary and appropriate for the protection of the free flow of interstate commerce. *United States* v. *Darby*, 312 U. S. 100.

A combination or agreement for price maintenance or which operates directly on prices or price structures of commodities moving in interstate commerce constitutes an unreasonable restraint within the Sherman Act, without regard to whether the prices or price structures agreed upon are reasonable or otherwise, *United States* v. *Trenton Potteries, supra; Ethyl Gasoline Corp* v. *United States*, 309 U. S. 436; *United States* v. *Socony-Vacuum Oil Co., supra; United Sates* v. *Masonite Corp.*, 316 U. S. 265; one not fixing prices but intended unreasonably to restrict or restrain interstate commerce, or which by its operation necessarily impedes the due course of such commerce, comes within the Act, *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295; one which contemplates restraint of interstate trade but to be effectuated by acts constituting instrastate activities is met with the condemnation of the Act, *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Ass'n.*, 274 U. S 37; *Local 167. International Brotherhood of Teamsters* v. *United States*, 291 U. S. 293; and primarily local likewise finds itself within the ambit of the Act if the means adopted to effectuate it operate to lay a direct and undue burden on interstate commerce. *Industrial Ass'n.*, v. *United States*, 268 U. S. 64. But a combination or concert limited in its objectives to intrastate activities, with no intent or purpose to affect interstate commerce, is without the reach of the Act, even though there may be an indirect and insubstantial effect on interstate commerce. *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344; *United Leather Workers* v. *Herkert*, 265 U. S. 457; *Industrial Ass'n.* v. *United States, supra; Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103.

Colorado has a Fair Trade Act, chapter 146, Laws of 1937; an Unfair Practices Act, chapter 261, Laws of 1937; and a Liquor Code, sections 15–47, chapter 89, Colorado Statutes Annotated 1935. Under section 1 of the Fair Trade Act a contract relating to the sale or resale of a commodity bearing the trade-mark, brand, or name of the producer or distributor, and which commodity is in free and open competition, shall not be deemed in violation of any law of the state by reason of providing that the buyer will not resell such commodity at less than the minimum price stipulated by the seller or that the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not resell at less than the minimum prices stipulated by the seller. Section 3 of the Unfair Practices Act provides that it shall be unlawful for anyone engaged in business in the state to sell, offer for sale, or adver-

tise for sale, any article or product for less than the cost thereof to the vendor, or give, offer to give, or advertise the intent to give away any article or product for the purpose of injuring competitors and destroying competition. Section 17 of the Liquor Code, as amended by chapter 160, Laws of 1941, makes it unlawful wilfully and knowingly to advertise, offer for sale, or sell vinous liquors, spirituous liquors and alcoholic beverages at less than the price stipulated in any contract entered into pursuant to the provisions of the Fair Trade Act; section 29 provides for a manufacturers' license, a wholesaler's license, and a retail liquor store license; and section 20 authorizes the licensing authority, created by the preceding section, to make rules and regulations pursuant to the licensing provisions. Regulation 1 (3) promulgated under the Liquor Code provides that all spirituous liquor sold or transferred within the state must be affixed with the proper stamps before sale or transfer, and that wholesalers shall affix the proper stamps upon all liquor sold by them within the state to retailers or consumers prior to delivery; and regulation 12 C provides that all alcoholic liquor shall be the sole and exclusive property of and subject to the unrestricted power of disposal of a duly licensed Colorado wholesale dealer, as defined in the Liquor Code, at the time such liquor crosses the state line coming into the state for the purpose of being sold, offered for sale, or used there. These statutes and regulations are emphasized as constituting legal warrant for the fair trade agreements referred to in the indictment. And, justifying his appearance in the case by reference to the observation of the court in *Washington Brewers Institute* v. *United States*, *supra*, that the failure of any state to appear as a friend of the court to protest the enforcement of the Sherman Act, was significant, the attorney general of Colorado filed in this cause a brief as amicus curiae, calling attention to these statutes and regulations and contending that the fair trade contracts described in the indictment were entered into under the Fair Trade Act and the Liquor Code, that they are removed from the regulation and control of the United States, and that they are subject exclusively to the control and operation of the law of Colorado.

The agreement as pleaded in the indictment in this case was essentially one to fix and maintain prices at which alcoholic beverages shall be sold at retail in Colorado. Under regulation 12 C, supra, it is impossible for a retailer in that state to buy liquor from a producer. He can purchase it only from a wholesaler licensed under the laws of the state. Before liquor produced in other states can be acquired from the wholesaler title vests in the wholesaler at the time it crosses the state line coming into the state, and the required stamps must be affixed by the wholesaler. When

it comes to rest in the ownership and custody of the wholesaler, is placed in the warehouse of the wholesaler for local disposition to the retailer, and is commingled with other merchandise, it ceases to be an integral part of interstate commerce. *Industrial Ass'n.* v. *United States, supra; Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564; *Higgins* v. *Carr Bros. Co.*, 317 U. S. 572; *Jewel Tea Co.* v. *Williams*, 118 F. (2d) 202; *Jax Beer Co.* v. *Redfern*, 124 F. (2d) 172; *Walling* v. *Goldblatt Bros.*, 128 F. (2d) 778; *Allesandro* v. *C. F. Smith Co.*, 136 F. (2d) 75. And sales subsequently made by the wholesaler to retailers and in turn by retailers to the consuming public are wholly intrastate transactions. *Jewel Tea Co.* v. *Williams, supra.*

The control of the handling, the sales, and the prices at the point of origin before movement in interstate commerce begins, or in the state where it ends, may in some circumstances directly and unduly burden interstate commerce. *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373; *Local 167, International Brotherhood of Teamsters* v. *United States, supra.* But here it is not charged that the parties agreed and conspired to fix and maintain prices at which producers or others outside Colorado should sell their products to wholesalers within the state. Neither is it charged that it was a part of the agreement that producers should establish uniform prices from all producers and distillers to all wholesalers in Colorado of certain types, ages, or qualities of liquor moving in interstate commerce. No charge of that kind direct or by fair inferences is to be found in the indictment.

True, it is charged that it was part of the agreement that the retailers patronize only those producers and wholesalers who enter into fair trade contracts and withhold their patronage from those who fail to do so; that the retailers agree with the producers and wholesalers that retailers selling at prices lower than those established in the fair trade contracts be deprived of the opportunity to purchase from the defendant producers and wholesalers; and that the defendant retailers threaten to boycott and do boycott producers and wholesalers who supply their products to retailers failing or refusing to observe such retail prices, mark-ups, and margins of profits. But the words "patronize" and "patronage" as used clearly refer to the purchase of beverages from producers and wholesalers. And it is perfectly obvious that these allegations are completely innocuous and ineffective in charging an offense under the Sherman Act for the reason that retailers in Colorado cannot purchase from producers, and sales from wholesalers to retailers in that state are exclusively intrastate transactions.

The second count is completely barren of any allegations of fact effectively charging that the combination and agreement was one directly and substantially to restrict or burden the free and un-

trammeled flow of interstate commerce. The combination as pleaded was one necessarily intended to affect only intrastate activities. Its sole objective was control of domestic enterprise within the state, and it spent its direct and substantial force upon intrastate activities. Its effect, if any, on interstate commerce was indirect, insubstantial, and incidental. A combination of that kind lies beyond the reach of the Sherman Act.

The judgments in Numbers 2792 to 2799, inclusive, are severally reversed and the causes remanded with directions to dismiss the indictment as to these appellants; and the judgments in Numbers 2807 and 2808 are severally reversed and the causes remanded with directions to overrule the demurrers.

PHILLIPS, *Circuit Judge*, dissenting:

I dissent from that part of the opinion which upholds the sufficiency of the indictments in Numbers 2807 and 2808.

It is not sufficient to charge a conspiracy in general terms. The unlawful agreement and the unlawful purpose must be set forth with sufficient particularity to enable the defendant to ascertain from the charge itself what he is called upon to answer, to prepare his defense and get the witnesses to meet the charge and, if necessary, to plead the judgment on such charge as a bar to a second prosecution for the same offense. "A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances." Every element of the offense "must be accurately and clearly alleged." *United States* v. *Cruikshank*, 92 U. S. 542, 558.

In Number 2807 the indictment alleges that the defendants engaged in a conspiracy from on or about January 1, 1920, until January 20, 1943, a period slightly in excess of 23 years; that the defendants carried on their business through 2825 stores, in 1029 towns, in 20 states and in the District of Columbia; and that the conspiracy was carried out in part in the District of Kansas, and "in many states of the United States."

In Number 2808 the indictment alleges that the defendants engaged in a conspiracy from January 1, 1917, to January 20, 1943; a period slightly in excess of 26 years; that the defendants carried on their business through 3422 stores, in 19 states; and that the conspiracy was carried out in part in the District of Kansas, and "in many states of the United States."

At the oral argument, counsel for the government admitted it did not rely upon an express agreement or conspiracy, but upon acts and circumstances from which a conspiracy may be implied. In neither indictment is the time, place, and circumstances of the alleged long-continuing conspiracies set forth with particularity. It follows that the defendants in each case must be prepared to

defend their entire conduct with respect to the matters charged against them over a period of approximately a quarter of a century, and in a great number of cities and towns throughout a large number of the states of the United States. To prepare a defense to the charges laid would be most difficult if not impossible. It imposes an unnecessary burden which can and should be avoided. The sufficiency of an indictment should be determined by practical, not purely technical, considerations. The test should be, does it, under all the circumstances of the case, tell the defendant all that he needs to know to enable him to prepare his defense, and does it so specify that with which he is charged that he will not be in danger of being a second time put in jeopardy?[1]

I agree that it is not necessary to plead, with particularity, the time, place, and circumstances of the manner and means of effecting the objects of the conspiracy. *Glasser* v. *United States*, 315 U. S. 60, 66. But it does seem to me that the time, place, and circumstance of the unlawful agreement should be pleaded with particularity. Paragraph 23 of the indictment in Number 2807 and Paragraph 20 of the indictment in Number 2808 do plead the terms of the alleged unlawful agreements. But neither alleges them with any particularity as to time, place, or circumstance, leaving the government free to prove acts and conduct from which it will ask the jury to infer the unlawful agreement, in Number 2807 limited only with respect to time to a period in excess of 23 years and with respect to place within 20 states of the Union and in the District of Columbia, and in Number 2808 limited only with respect to time to a period in excess of 26 years and with respect to place within 19 states of the Union. One of the terms of both the conspiracies as charged is that the defendants would select local areas wherein they would use their dominant advantage to injure and destroy the competition of independent grocers, meat dealers, and small local food stores. Another term of both of the conspiracies as charged is that the defendants would systematically prevent competition in selected trade areas. The government expects to prove facts and circumstances from which it will ask the jury to infer that the defendants so agreed and conspired. If the unlawful agreement was an implied one, arising out of acts and conduct on the part of the defendants, then the time and place of the unlawful agreement were coincident with the time and place of such acts and conduct, and that time and place should be alleged in the indictments.

I see no reason why the government should not allege, and, indeed, it seems to me it should be required to allege, in each indictment, with reasonable particularity the period within which it expects to prove the acts and conduct from which such term of the

---

[1] *Hill* v. *United States*, 4 Cir., 42 F. 2d 812, 814; *Center* v. *United States*, 4 Cir., 96 F. 2d 127, 129; *Hewitt* v. *United States*, 8 Cir., 110 F. 2d 1, 6.

conspiracy may be implied, and with reasonable particularity the place or places at which such acts and conduct took place. The same is true with respect to the other terms of the conspiracy alleged in Paragraph 23 in Number 2807 and the terms of the conspiracy alleged in Paragraph 20 in Number 2808. If the exact time was unknown to the grand jurors, that fact could be alleged, but with reasonable approximation the government should be able to allege the period of time within which such acts and conduct occurred and the place or places where they occurred. I do not mean that the government should have alleged the acts and conduct, but rather that it should have alleged the time and place of such acts and conduct, as for example, "in continuation of, and as a part of the same combination and conspiracy, the defendants between the first day of December, 1926, and the first day of December, 1927, the exact date being to the grand jurors unknown, in the states of Ohio and California, the exact places being to the grand jurors unknown, conspired and agreed to select local areas wherein they would use their dominant advantage to injure and destroy the competition of independent grocers, meat dealers, and small local food stores." The times and places in the example, of course, are improvised. By so doing, the government would meet the requirements laid down in the Cruikshank case that the acts and the intent which make up the crime must be set forth in the indictment with reasonable particularity as to time, place, and circumstance.

There are practical reasons why the requirement of particularity should be strictly adhered to in a conspiracy charge. It is a well-known fact that the preparation of a defense to a conspiracy charge imposes a most difficult task and the government should not be permitted to increase that difficulty by resorting to general allegations in the indictment.

Both indictments charge a conspiracy "to restrain interstate trade and commerce in food and food products." In neither indictment is the phrase defined with particularity. The food and food products dealt in by the defendants embrace a vast number of items. It seems to me that the indictments should charge the general categories of food and food products, as for example, "fresh fruits and vegetables," "canned fruits and vegetables," "coffees, teas, and spices," so that the defendants will know the categories of food and food products with respect to which they are charged to have conspired to restrain interstate trade and commerce, and thus be able to prepare their defense.

For the foregoing reasons, and the reasons stated by Judge Vaught in his dissenting opinion filed to the first opinion, now withdrawn, in Numbers 2807 and 2808, it is my opinion that the demurrers to the indictments were properly sustained. A copy of such dissenting opinion is appended hereto.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

Appeal from the District Court of the United States for the District of Kansas

Nos. 2807–2808—January Term, 1944

2807

UNITED STATES OF AMERICA, APPELLANT

v.

SAFEWAY STORES, INCORPORATED (MARYLAND); SUTTER PACKING COMPANY; ARIZONA GROCERY COMPANY; L. A. WARREN; LAWRENCE GILES; W. L. HARRISON; A. D. KIRKLAND; V. O. STOCKLAND; J. R. FRENCH; C. N. SANDERS; DWIGHT EDWARDS; RALPH PRINGLE; FRANK PRINGLE; M. L. LANGFORD; F. O. BURNS; AND R. L. BUCHANAN, APPELLEES

2808

UNITED STATES OF AMERICA, APPELLANT

v.

THE KROGER GROCERY & BAKING COMPANY, WESCO FOODS COMPANY, THE COLTER COMPANY, PAY'N TAKIT, INC., CHARLES M. ROBERTSON, JOSEPH BAPPERT, FRANK L. REOCK, AND JOSEPH B. HALL, APPELLEES

[January 17, 1944]

Holmes Baldridge, Special Assistant to the Attorney General (Wendell Berge, Assistant Attorney General, George H. West, United States Attorney, Horace L. Flurry and Earl A. Jinkinson, Special Assistants to the Attorney General, were with him on the brief) for Appellant.

Henry N. Ess (Mitchell T. Neff and Louis R. Gates were with him on the brief) for Appellees Safeway Stores, Incorporated (Maryland), et al.

Robert S. Marx (Frank E. Wood; Thomas M. Lillard; Nichols, Wood, Marx & Ginter; and Lillard, Eidson, Lewis & Porter were with him on the brief), for Appellees The Kroger Grocery & Baking Company, et al.

Before PHILLIPS and BRATTON, Circuit Judges, and VAUGHT, District Judge

VAUGHT, *District Judge*, dissenting:

This opinion pertains to Cause Number 2807 in its analysis but applies to Cause Number 2808 as to final results.

The indictment is in two counts. The first count charges an unlawful conspiracy to restrain interstate trade and commerce in the manufacture, distribution and sale of food products in many states of the United States in violation of Section 1 of the Sherman Act. The second count charges an unlawful combination and conspiracy to monopolize interstate trade and commerce in the manufacture and distribution of food and food products in many states of the United States in violation of Section 2 of the Sherman Act. Demurrers to the indictments were sustained and the plaintiff has appealed.

The indictment is long and complicated. The charging part of the first count is contained in paragraphs 22 to 27, and in the second count in paragraphs 28 to 33.

An indictment for conspiracy is probably the most difficult pleading a prosecutor is called upon to prepare. The very nature and character of the crime are such that it is conceived and executed under cover, and often can only be proved by piecing together the overt acts and the means employed by the defendants in devising and carrying out the scheme. There are two general classes of conspiracy. One, a conspiracy to commit a crime, and one, in which the conspiracy itself constitutes the crime. One of the most satisfactory definitions of conspiracy, so far as it pertains to the case at bar, is found in Pettibone v. United States, 148 U. S. 197, 203, where Mr. Chief Justice Fuller said:

"A conspiracy is sufficiently described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means, and the rule is accepted, as laid down by Chief Justice Shaw in Commonwealth v. Hunt, 4 Met. 111, that when the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment; while if the criminality of the offence consists in the agreement to accomplish a purpose not in itself criminal or unlawful, by criminal or unlawful means, the means must be set out."

In *United States* v. *American Naval Stores Company et al.*, 172 F. 455, the court well said: "The gist of the offense is the unlawful agreement."

Thus, in the case at bar, the gist of the offense is the unlawful agreement.

The indictment brings the accused into court. From that document he must determine *what* specific acts he is charged with having committed; *where*, *when* and *how* he is charged with having done the act. Crime is made up of acts and intent. Prosecutors, sometimes, in their zeal and ambition to protect the public,

overlook the fact that it is their duty not only to prosecute the guilty, but to protect the innocent from the embarrassment and expense of defending a groundless accusation. In recognition of this tendency and in order to throw about the citizen proper safeguards against it, the Fifth and Sixth Amendments to the Constitution were adopted. They provide, so far as pertinent here, that:

"No person shall * * * be deprived of life, liberty or property without due process of law * * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * *."

and

"In all criminal prosecutions the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; * * *."

When a grand jury returns an indictment, it is presumed to be in possession of all the facts that are necessary to constitute the offense. If it is not, the indictment should not have been returned. The prosecutor who draws the indictment is equally advised, and there is no occasion for vagueness, lack of clarity, or ambiguity in the language employed in framing the charge in the indictment. It should be sufficiently definite, clear and simple that a layman can easily comprehend it.

Our courts have always been zealous to safeguard the rights of the citizen in this regard, fully recognizing the gravity of the situation confronting one charged with a crime. His life, his property, his good name may all depend upon the facts pleaded in the indictment. The Constitution guarantees to the citizen the right to be informed of the nature and cause of the accusation, and one must be able to ascertain the facts from the charge filed against him. Rather early in our history the courts began to express their views on the subject in clear and concise language. Probably the whole subject has been no more clearly expressed than in that landmark decision, *United States* v. *Cruikshank et al.*, 92 U. S. 542, 557, when the court said:

"* * * the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' * * * the indictment must set forth the offence 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;' and * * * '*every ingredient* of which the offence is composed *must be accurately* and *clearly alleged*.' * * * The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it

may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances." [Italics supplied.]

Counsel have cited many authorities, but when they are read in the light of the facts involved in each particular case, the principle remains the same. It is quite simple. What, where, when, and how, are the questions to be answered in every criminal charge. The defendant must be able to secure the answers to those questions from reading the indictment. He is not required to guess at any of them.

What does the indictment say in this case? In the first paragraph of count one, which is adopted by reference in count two, it is charged that

"Each of the allegations hereinafter contained in this count shall be deemed to refer to the period of time beginning on or about January 1, 1920, the exact date being to the Grand Jurors unknown, and continuing thereafter up to and including the date of the presentation of this indictment, unless otherwise expressly stated."

The record discloses that the indictment was presented December 7, 1942. Thus, the defendants are apprised that the period of time covered is 22 years. From the memorandum opinion of the trial court (R. 49), we are informed the indictment contains 30 pages and is made up of 33 separately numbered paragraphs. Many of the paragraphs have several subdivisions. The charging part of the indictment is contained in paragraphs 22 to 27, charging restraint of trade, and paragraphs 28 to 33, charging monopoly. The other paragraphs are made up of definitions, and the nature, extent, organization and growth of the business of the defendants.

The indictment discloses that the defendant Safeway Stores, Incorporated, in 1941, had 2825 stores in 1029 towns in various parts of the United States. Paragraph 22 charges as follows:

"For many years prior to the return of this indictment, and continuously up to and including the day of the finding and presentation of this indictment, defendants, and other persons to the grand jurors unknown, well knowing all the facts alleged in this indictment, have wilfully and unlawfully formed and carried out, in part within the District of Kansas, First Division, a wrongful and unlawful combination and conspiracy to unduly, unreasonably and directly restrain interstate trade and commerce in food and food products, produced, distributed and sold in many states of

the United States, in violation of Section 1 of the Act of Congress of July 2, 1890, * * * the Sherman Act."

Paragraph 23: "The aforesaid combination and conspiracy has consisted in a continuing agreement and concert of action among the defendants, the substantial terms of which have been:

"a. That the defendants acquire by merger and otherwise the business of independent retail grocers and local chains throughout the United States,

"b. That the defendants select local areas throughout the United States wherein they use their dominant advantage to injure and destroy the competition of independent grocers, meat dealers and small local food chains," (No place is named here.)

"(1) By selling at retail in those areas sufficiently lower than elsewhere, until control or the desired percentage of total retail business is obtained, using the income from other areas and from operations of the business other than retail, to offset the losses or reductions in profits incident to such price cutting." (No "areas" are named here and in vain would defendants ask where all of this was to be done.)

"(2) By combining with other national food chains, operating in such selected areas, to fix, maintain and follow the prices established by defendants." (What "selected areas" and where were they located?)

"c. That defendants systematically prevent competition in selected trade areas throughout the United States," (How are the defendants to know or ascertain from this charge, where such "selected trade areas" are located "throughout the United States"?)

"(1) By combining with the independent grocers and local and national food chains operating therein to fix the retail prices and terms upon which food would be sold in such areas," (What "independent grocers and local and national food chains" and where are they located, and what "food" would be sold in such areas?)

"(2) By combining with manufacturers of food and food products and others to fix and maintain the resale prices and policies in such selected areas and to aid and assist such manufacturers and others in enforcing the resale prices so fixed and established. * * *." (What "manufacturers," and where are they located, and what "food and food products" are meant here? Who are the parties designated as "others"; where located; and what "policies" are to be maintained?)

Thus the indictment runs throughout its 30 pages. Under paragraph 23, subdivision d, are listed eight charges in which the word "suppliers" is used, but nowhere in the definitions in the indictment is this term defined. The defendants can only guess with whom they are charged with dealing here, and can only guess where they are located. Subdivision e mentions "competitors"

without naming them in any instance or locating them, again leaving the defendants to guess, who is meant or where they were located, except that they were somewhere within the broad confines of the United States. Subdivision (2) of subdivision e of paragraph 23 reads:

"By organizing, financing and preparing publicity and propaganda for false front farmer, consumer and housewife organizations, civic clubs and other organizations, and using the statements of such organizations in support of such false comparisons and reports as to prices, values and services offered by defendants and their competitors."

What is meant here by "false front farmer, consumer and housewife organizations?" What "civic clubs" and "other organizations?" They are not named and their location is undisclosed. Subdivision e (3) reads:

"By the systematic practice of secretly enhancing their actual prices above their advertised prices through short-changing, short-weighting and marking up prices on store tags and purchases."

In which of the 2825 stores did these things occur? How can the defendants know from reading the charge? Or was it meant to charge that they occurred in each store every day for 22 years? Paragraph 24 might so indicate and the defendants could not be certain until the trial. It reads:

"During the period of time covered by this indictment, and for the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants, by agreement and concert of action, have done the things which, as hereinbefore alleged, they conspired to do."

As the defendants read this indictment and attempt to comprehend it for the purpose of preparing a defense to the charges, which leave so much to speculation, in what situation are they placed? They have 2825 stores located throughout the United States, doing business every day, making millions of sales each year. If just one act a day in each store was contemplated by the charge, it would mean 1,031,125 acts to be checked in order to be safe in the preparation for trial. An indictment charging one with a crime must be more definite than that. A defendant has a right to be specifically charged.

It is agreed that the conspiracy is the crime here, and that overt acts need not be charged, but the vice of the indictment is that in seeking to charge elements of the agreement, the charge becomes vague, ambiguous and so utterly confusing that neither the defendants nor the court can comprehend it. The defendants could be prosecuted many, many times on the same charge, and could not successfully plead a former conviction or acquittal under such a charge.

Paragraph 25 seeks to designate the effect of the conspiracy, and practically every sentence therein is a conclusion of the pleader.

Paragraph 26 has to do with the "jurisdiction and venue" and presents a rather novel situation. It reads:

"The combination and conspiracy herein alleged has been entered into and carried out in part within the District of Kansas and within the First Division thereof, where the defendant Safeway Stores, Inc., a Nevada corporation, has retail food stores, offices, and agents, and transacts business. During the period of said combination and conspiracy and within three years next preceding the presentation of this indictment, the defendants have performed within the District of Kansas and within the First Division thereof many of the acts set forth in Paragraph 23 hereof. Particularly, the said defendants have continuously since September 1, 1939, and down to the present time, advertised food and food products in Kansas City, Kansas, and elsewhere in the state of Kansas, below cost and below the price charged by them for similar products in other locations, for the purpose and with the intent of injuring and destroying competition of independent concerns and local chain stores."

Here, for the first time, we find a date that apprises the defendants of the time some specific act, which is claimed to be unlawful, is charged to have occurred. It is charged that the combination and conspiracy alleged has been "entered into and carried out in part within the District of Kansas." It will be observed that the indictment alleges, in the beginning of the charge, that the conspiracy was formed 22 years ago. Is it intended, now, to be charged that it was so formed in part in Kansas 22 years ago, or is it intended to charge that it was entered into in part in the state of Kansas in the past three years? Again, the defendants must guess or speculate. But particularizing, it is charged that within three years next preceding the indictment, the defendants have performed many of the acts set forth in paragraph 23 within the state of Kansas. What, specifically? The defendants have a right to be informed.

Then further particularizing, it is charged that the defendants have continuously since September 1, 1939, down to the date of the presentment of the indictment "advertised food and food products" in Kansas City, Kansas, "and elsewhere in the state of Kansas," below cost and "below the price charged by them" for "similar products" in "other locations" for the purpose and intent of injuring and destroying "competition" of "independent concerns" and "local chain stores."

What is intended by the phrase, "food and food products," in this connection? How can the defendants know what is meant

to be charged? "Food and food products" cover a wide field. The defendants must defend against this charge. They are continuously dealing in perishable "food and food products"; they must be continually on the alert to maintain their stocks of food and food products in a merchantable condition. This of necessity, when dealing with perishable goods, calls for prompt action in each store, regardless of what the condition may be in other like stores, there, or in other localities.

It is charged that the advertisement was in Kansas City, Kansas, and "elsewhere in the state of Kansas." Where? It is charged that the advertisements were "for the purpose and with the intent" of injuring and destroying "competition of independent concerns and local chain stores." Naturally, the defendants again inquire, what "independent concerns" and what "local chain stores" and where?

Count number two charges "combination and conspiracy to monopolize" in the same language as count number one.

An indictment for conspiracy to restrain interstate trade and commerce is governed by the same rules of law as any other offense. It is not enough to allege the crime in the words of the statute. To charge one with "murder," "burglary," or any other crime, the elements of the offense must appear, as hereinbefore designated. If any of these elements in such cases is absent in the charge, then the charge is defective.

It is true that in a conspiracy charge such as we have in the case at bar, the agreement itself is the crime, but one has the right to know and be informed by indictment which charges it, where and when the agreement was formed and what its elements were.

This court has consistently held that the place of an alleged offense must be charged with particularity. In *Skelley* v. *United States*, 37 F. 2d 503, it held:

"Indictment charging that defendant at Oklahoma City wilfully, unlawfully, and fraudulently received, concealed, bought, and facilitated transportation and concealment after importation of smoking opium, under 21 USCA sec. 174, held insufficient for failure to designate specifically the place where the offense was committed; nature and cause of accusation not being sufficiently stated to comply with Const. Amends. 5, 6."

In holding the demurrer to the indictment should have been sustained, the court said:

"* * * Oklahoma City has a population of about 150,000, and of course, there are innumerable places therein where the crime charged might have been committed. The police officers who made the arrest and discovered the drug in the possession of appellant gave the name of the street and the street number in

their testimony, where the drug was found; but for some inexplainable reason the pleader did not put the location in the indictment. Nor did he otherwise 'earmark' the charge as Judge Booth aptly terms it in *Myers* v. *United States* (C. C. A.) 15 F. (2d) 987 et seq., so as to separate and make certain from the general charge therein contained the particular offense of which appellant was accused and was to be put on trial."

In *White* v. *United States*, 10 Cir., 67 F. 2d 71, the court followed the reasoning in the *Skelley* Case, supra, and after a careful analysis of the leading federal cases dealing with indictments charging a conspiracy, the court concluded:

"In dealing with laws which are intended equally for the protection of the innocent as well as the punishment of the guilty, too much latitude should not be indulged solely for the purpose of arriving at a desired result in an individual case. The looseness in criminal pleading brought to light in this case should not receive encouragement through judicial sanction."

The majority opinion in the case at bar states that we must depart from the holding in the *Skelley* and *White* cases for the reason that they are out of harmony with *Glasser* v. *United States*, 315 U. S. 60.

An analysis of the *Glasser* Case leads to a different conclusion. The particular count of the indictment which was under consideration, after alleging that during certain periods, Glasser and Kretske were assistant United States attorneys for the Northern District of Illinois, employed to prosecute all delinquents for crimes and offenses cognizable under the authority of the United States, and more particularly, violations of the federal internal revenue laws relating to liquor, charged in substance that the defendants conspired to "defraud the United States of and concerning its governmental function to be honestly, faithfully and dutifully represented in the courts of the United States" in such matters "free from corruption, improper influence, dishonesty, or fraud." The means were then set out in detail. The indictment contained every ingredient of the conspiracy. It charged a conspiracy was entered into by the defendants within the jurisdiction of the court, and with sufficient clarity, how, when, and where the conspiracy was formed. It left nothing for speculation or guess so far as these elements were concerned. Certain matters, as to details, might be called for, or requested by, a bill of particulars, but the indictment must always be definite and clear as to the ingredients of the offense. If these are not set out with sufficient clarity to inform the defendant what he is required to meet, it is a defective indictment. If the ingredients of the offense are not contained within the four corners of that document, nothing that might be supplied by the prosecutor by way of a bill of particulars can suffice. It

was not even contended in the *Glasser* Case that the indictment was not specific as to the elements constituting the conspiracy. The court said:

"* * * The particularity of time, place, circumstances, causes, etc., in stating the manner and means of effecting the *object of a conspiracy*, for which petitioners contend, is not essential to an indictment." [Italics supplied.]

It will be noted that this conclusion is not with respect to the elements of the conspiracy itself, but to the means of *effecting the object* of the conspiracy. The indictment contains all of the necessary elements of the conspiracy. That which the court says is not essential to be alleged in the indictment has reference to the overt acts.

In the case at bar, we are not dealing with overt acts. They are not necessary elements in the charge of conspiracy. Where allegations in the indictment are not definite in stating the alleged conspirators, the place, time and manner in which the unlawful agreement was reached, which constituted the conspiracy, the indictment is so defective that it cannot be cured by a bill of particulars.

I feel that this court in the *Skelley* and *White* cases properly stated the law and that these cases are not affected by the *Glasser* Case, since in that case the Supreme Court, after in effect holding that the indictment alleged every necessary element of the conspiracy, and alleged an overt act in carrying the conspiracy into effect, said the "particularity of time, place, circumstances, causes, etc., in stating the manner and means of effecting the object of a conspiracy, for which petitioners contend, is not essential to an indictment."

An examination of *Crawford* v. *United States*, 212 U. S. 183, and *Dealy* v. *United States*, 152 U. S. 539, on which the Supreme Court bases the above conclusion in the *Glasser* Case, discloses that in the *Crawford* Case the defendant and others were indicted for a conspiracy to defraud the United States by means stated in the indictment, and in relation to a contract between the Postal Device and Lock Company and the Post Office Department of the United States by which that company was to furnish certain satchels to the department for the use of the letter carriers in the free delivery system of the government. The indictment set out a number of acts of the defendants with minute particularity in the furtherance of the conspiracy and charged that on June 3, 1902 the defendant and Machen and one Lorenz, intending to defraud the United States, unlawfully and fraudulently conspired, "knowingly, wrongfully and corruptly to defraud the United States in a dishonest manner, and through and by means of a dishonest scheme and arrangement." Then follows the full terms of the

agreement. The indictment informs the defendant exactly what he is charged with having done, and when, where and how he was to consummate the conspiracy. It leaves nothing to speculation or guess and he knows with what he is called upon to defend.

In *Dealy* v. *United States*, *supra*, in an opinion by Mr. Justice Brewer, the court said:

"The gist of the offense is the conspiracy. As said by Mr. Justice Woods, speaking for this court, in *United States* v. *Britton*, 108 U. S. 199, 204: 'This offence does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a locus penitentiae, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute.' Hence, if the conspiracy was entered into within the limits of the United States and the jurisdiction of the court, the crime was then complete, and the subsequent overt act in pursuance thereof may have been done anywhere."

The construction placed by the majority opinion upon the *Glasser* Case, which is based upon the *Crawford* and the *Dealy* cases, in my judgment, is not consistent either with the *Glasser* Case or the cases upon which it is based.

It is with great reluctance that I dissent from the majority opinion of my distinguished friends on this court, but I have such a firm conviction that an indictment cannot be stated in legal conclusions and in terms so general and idefinite as those contained in this indictment, that I must conclude that the judgment of the lower court should be affirmed.

Judgment, Case No. 2792. Aug. 26, 1944

Forty-ninth Day, May Term, Saturday, August 26th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, Honorable Walter A. Huxman, and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the indictment as to appellant.

Judgment, Case No. 2793, Aug. 26, 1944

Forty-ninth Day, May Term, Saturday, August 26th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, Honorable Walter A. Huxman, and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the indictment as to appellant.

Judgment, Case No. 2794, Aug. 26, 1944

Forty-ninth Day, May Term, Saturday, August 26th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, Honorable Walter A. Huxman, and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the indictment as to appellant.

Judgment, Case No. 2795, Aug. 26, 1944

Forty-ninth Day, May Term, Saturday, August 26th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, Honorable Walter A. Huxman, and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the indictment as to appellant.

Judgment, Case No. 2796, Aug. 26, 1944

Forty-ninth Day, May Term, Saturday, August 26th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, Honorable Walter A. Huxman, and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the indictment as to appellant.

Judgment, Case No. 2797, Aug. 26, 1944

Forty-ninth Day, May Term, Saturday, August 26th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, Honorable Walter A. Huxman, and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of Colorado and was argued by counsel.

On considerations whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the indictment as to appellant.

Judgment, Case No. 2798, Aug. 26, 1944

Forty-ninth Day, May Term, Saturday, August 26th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, Honorable Walter A. Huxman, and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the indictment as to appellant.

Judgment, Case No. 2799, Aug. 26, 1944

Forty-ninth Day, May Term, Saturday, August 26th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, Honorable Walter A. Huxman, and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the indictment as to appellant.

Order Withdrawing Opinion of February 28, 1944

Fifty-second Day, May Term, September 2nd, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, Honorable Walter A. Huxman, and Honorable Alfred P. Murrah, Circuit Judges.

It is now here ordered by the court that the opinion filed in these causes on February 28, 1944, be and the same is hereby withdrawn.

Order Staying Mandates

First Day, September Term, Tuesday, September 5th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

These causes came on to be heard on the motion of appellee for a stay of the mandates herein and were submitted to the court.

On consideration whereof, it is now here ordered by the court that said motion be and the same is hereby granted and that no mandate of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under section 3 of rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the cases by the Supreme Court.

Clerk's Certificate

United States Circuit Court of Appeals, Tenth Circuit

I, Robert B. Cartwright, Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify the foregoing as a full, true, and complete copy of the transcript of the record from the District Court of the United States for the District of Colorado, and full, true, and complete copies of certain pleadings, record entries and proceedings, including the opinion (except full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States) had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in certain causes in said United States Circuit Court of Appeals, Nos. 2792 to 2799, inclusive, wherein Frankfort Distilleries, Inc., et al. were appellants, and United States of America was appellee, as full, true, and complete as the originals of the same remain on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 12th day of September, A. D. 1944.

[SEAL]

ROBERT B. CARTWRIGHT,
Clerk of the United States Circuit,
Court of Appeals, Tenth Circuit,
By GEORGE A. PEASE,
Chief Deputy Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1944

137 Supreme Court of the United States

No. 523, October Term, 1944

Order allowing certiorari

Filed November 13, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

138 Supreme Court of the United States

No. 524, October Term, 1944

Order allowing certiorari

Filed November 13, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

139 Supreme Court of the United States

No. 525, October Term, 1944

Order allowing certiorari

Filed November 13, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

140 Supreme Court of the United States

No. 526, October Term, 1944

Order allowing certiorari

Filed November 13, 1944

The petition herein for a writ of certiorari to the United State Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

141 Supreme Court of the United States

No. 527, October Term, 1944

Order allowing certiorari

Filed November 13, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

142 Supreme Court of the United States

No. 528, October Term, 1944

Order allowing certiorari

Filed November 13, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

143 Supreme Court of the United States

No. 529, October Term, 1944

Order allowing certiorari

Filed November 13, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

144 Supreme Court of the United States

No. 530, October Term, 1944

Order allowing certiorari

Filed November 13, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE 1944